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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1884.**

No. ~~294~~. 35

HUMPHREY BELL, HIRAM A. WHITNAH, AND ANDREW J. WHITNAH, PLAINTIFFS IN ERROR,

*vs.*

THE FIRST NATIONAL BANK OF CHICAGO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

**FILED OCTOBER 4, 1882.**

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States courtrooms, in the city of Chicago in the district aforesaid, before the Hon. Thomas Drummond, judge of the United States circuit court for the seventh circuit, and the Hon. Henry W. Blodgett, district judge of the United States for said northern district of Illinois, judges of said circuit court, on Wednesday, the fifth day of April, in the adjourned March term of said court, in the year of our Lord one thousand eight hundred and eighty-two and of our Independence the one hundred and sixth year.

WILLIAM H. BRADLEY, *Clerk.*

First National Bank of Chicago
*vs.*
Humphrey Bell, Hiram Whitnah, and Andrew J. Whitnah.
} Assumpsit.

2 Northern District of Illinois, *ss:*

Be it remembered, that on thirty-first day of October, A. D. 1878, came The First National Bank of Chicago, plaintiff, by its attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago in said district, its *præcipe* for a writ of summons against said defendants, and also at the same time filed its bonds for costs in said entitled cause, which said *præcipe* and bond are respectively in the words and figures following, to wit:

*Præcipe.*

United States of America,
*Northern District of Illinois,* } *ss:*

Circuit Court of the United States for the Northern District of Illinois, of the October Term, A. D. 1878.

The First National Bank of Chicago, Plaintiff,
*vs.*
Humphrey Bell, Hiram A. Whitnah, and Andrew J. Whitnah, partners under the firm name and style of Humphrey Bell & Co., Defendants.
} Assumpsit. Damages, $11,000.00.

3 The clerk of said court will issue a summons in the above-entitled cause to said defendants in a plea of trespass on the case on promises to the damage of said plaintiff in the sum of eleven thousand dollars, direct the same to the United States marshal of said district to execute, and make it returnable to the December term of said court, A. D. 1878.

HITCHCOCK, DUPEE & JUDAH,
*Plaintiff's Attorneys.*

To Hon. Wm. H. Bradley, clerk.
Chicago, October 31st, A. D. 1878.

(Endorsed:) Filed this 31st day of October, A. D. 1878. Wm. H. Bradley, clerk.

*Bonds for Costs.*

UNITED STATES OF AMERICA, }
*Northern District of Illinois,* } *ss:*

Circuit Court. October Term, A. D. 1878.

THE FIRST NATIONAL BANK OF CHICAGO }
*vs.* } In Assumpsit.
HUMPHREY BELL *et al.* }

4 We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid it hereby agree and stipulate that execution may issue against our property for any costs taxed against it.

Dated this 31st day of October, A. D. 1878.

HITCHCOCK, DUPEE & JUDAH.

(Endorsed:) Filed Oct. 31, A. D. 1878. W. H. Bradley, clerk.

On the same day, to wit; on the thirty-first day of October, A. D. 1878, a writ of summons, issued out of said clerk's office, against said defendants in said entitled cause, which said writ, together with the return of the marshal thereto attached, is in the words and figures following, to wit:

*Summons.*

CIRCUIT COURT OF THE UNITED STATES OF AMERICA, }
*Northern District of Illinois,* } *ss:*

The United States of America to the marshal of the northern district of Illinois, Greeting:

5 We command you to summon Humphrey Bell, Hiram A. Whitnah, and Andrew J. Whitnah, partners under the firm name and style of Humphrey Bell & Co., if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid on the third Monday of December next, to answer unto The First National Bank of Chicago of a plea of trespass on the case upon promises to, its damage as it alleges, of eleven thousand dollars, and have you then and there this writ.

Witness, the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 31st day of October, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the 103d year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

*Special Deputy's Return.*

UNITED STATES OF AMERICA,
*Northern District of Illinois,* } *ss:*

Know all men by these presents that I have appointed, and by these presents do appoint, Monroe L. Willard my true and 6 lawful deputy to execute the annexed writ, The First National Bank of Chicago *vs.* Humphrey Bell *et al.*, and to make return of the execution thereof according to law.

JESSE S. HILDRUP, [SEAL.]
*U. S. Marshal for the Northern District of Illinois.*

I have served the annexed writ in the following manner, to wit, by reading the same to and in the presence and the hearing of Hiram A. Whitnah therein named, on the 4th day of December, A. D. 1878. I did not serve the other defendants therein named, being unable to find them within my district.

JESSE S. HILDRUP,
*United States Marshal,*
By MONROE L. WILLARD,
*Special Deputy.*

UNITED STATES OF AMERICA,
*Northern District of Illinois,* } *ss:*

Monroe L. Willard, being duly sworn, deposes and says that he served the annexed writ as stated in the foregoing return, and that the expense returned by him in addition to the fees was actually incurred, and that the same is according to law.

MONROE L. WILLARD.

Subscribed and sworn to before me, this 5th day of December, A. D. 1878.

7 [SEAL.] JOHN C. HEAZLITT,
*Notary Public.*

(Endorsed:) Filed Dec. 5, A. D. 1878. W. H. Bradley, clerk.

Afterwards, to wit, on the fifth day of December, A. D. 1878, an *alias* writ of summons issued out of said clerk's office against said defendants in said entitled cause, which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

*Alias Summons.*

Circuit Court of the United States of America.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

The United States of America to the marshal of the southern district of Illinois, Greeting:

We command you again to summon Humphrey Bell and Andrew J. Whitnah, impleaded with Hiram A. Whitnah, partners, &c., if

found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof to be holden at Chicago,
8 in the district aforesaid, on the third Monday of December, 1878, to answer unto The First National Bank of Chicago of a plea of trespass on the case upon promises to its damage, as it alleges, of eleven thousand dollars, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this fifth day of December, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the 103d year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

*Marshal's Return.*

Executed this writ on the 6th day of December, 1878, by reading the same to the within-named Humphrey Bell & Andrew J. Whitnah, as I am herein commanded.

E. R. ROE,
*U. S. M., Southern Dist. Ills.*
By N. B. AMES, *Deputy.*

(Endorsed:) Filed Dec. 9th, A. D. 1878. W. H. Bradley, clerk.

9 Afterwards, to wit, on the sixth day of December, A. D. 1878, came the plaintiff by its attorneys and filed in said clerk's office its declaration in said entitled cause, which said declaration is in the words and figures following, to wit:

*Declaration.*

UNITED STATES OF AMERICA, } *ss:*
*Northern District of Illinois,* }

In the Circuit Court of the United States for the Northern District of Illinois, of the October Term, A. D. 1878.

The First National Bank of Chicago, a corporation duly organized under the national banking laws and doing business in Chicago, Cook county, Illinois, plaintiff in this suit, by Hitchcock, Dupee & Judah, its attorneys, complains of Humphrey Bell, Hiram A. Whitnah, and Andrew J. Whitnah, partners, under the firm name and style of Humphrey Bell & Co., and all citizens of and residents in the State of Illinois, defendants in this suit, summoned, &c., of a plea of trespass on the case on promises.

For that whereas the said defendants, under the name and style of Humphrey Bell & Co., heretofore, to wit, on the fourth
10 day March, 1878, at, to wit, Canton, at, to wit, the district aforesaid, according to the usage and custom of merchants, made their certain bill of exchange in writing, bearing date the day and year aforesaid, and then and there directed the said bill of exchange to Mr. W. D. Turner, Jr., Liverpool, and thereby, then and there,

requested said W. D. Turner, Jr., sixty days after sight of that their first of exchange (second and third of the same tenor unpaid), to pay to the order of themselves, under the style of "ourselves," in London, the sum of eight hundred and fifty pounds sterling (£850.00) for value received, which said bill of exchange the said W. D. Turner, Ju'r, afterwards, to wit, on the day and year aforesaid, at, to wit, the district aforesaid, upon sight thereof, accepted according to said usage and custom of merchants, payable at Messrs. Barclay & Co., bankers, London, due 21st May; and the said defendants, to whom or to whose order the payment of the said sum of money in the said bill specified was to be made, after the making of the said bill and before the payment of the said sum of money, to wit, on the day and year aforesaid, at, to wit, the district aforesaid, duly endorsed the said bill under the style of Humphrey Bell & Co., and thereby, then and there, ordered and appointed the said sum of money to be paid
to First National National Bank, Canton, Ill., or order, and
11 then and there delivered said bill to said First National Bank
of Canton.

And the said First National Bank of Canton, to whom or to whose order the payment of said sum of money was to be made, after the making of said bill and before the payment of said money, to wit, on the day and year aforesaid, at, to wit, the district aforesaid, duly endorsed said bill under the style of First National Bank, Canton, Ill., C. T. Heald, cashier, and thereby, then and there, ordered and appointed said sum of money to be paid to said plaintiff, and then and there delivered said bill to said plaintiff. And the plaintiff avers that afterwards, when the said bill became due and payable, according to the tenor and effect thereof and of said acceptance, to wit, on May 21st, 1878, at said Messrs. Barclay & Co., bankers, London, said bill was duly presented and shown for payment thereof, and payment of said sum of money was then and there required, but that neither said Messrs. Barclay & Co. nor said W. D. Turner, Ju'r, nor any person or persons on behalf of said W. D. Turner, Ju'r, did, or would then, or at any time before or afterwards, pay said sum of money or any part thereof, but then and there wholly ne-
glected and refused so to do, nor did the said W. D. Turner,
12 Ju'r, or any person on his behalf, pay said second and third
of exchange in said bill mentioned, or either of them, but therein wholly failed and made default, and thereupon, afterwards, to wit, on May 21st, 1878, aforesaid, said bill was duly protested for non-payment thereof, of all which said several premises the said defendants afterwards, to wit, on the day and year last aforesaid, at, to wit, the district aforesaid, had notice, by means whereof and according to the usage and custom of merchants said defendants then and there became liable to pay to said plaintiff the said sum of money in said bill specified when they should be thereunto afterwards requested, and being so liable said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at, to wit, the district aforesaid, undertook, and then and there faithfully promised the plaintiff, to pay it said sum of money in said bill specified when they, the defendants, should be thereunto afterwards requested.

And whereas, also, the said defendants afterwards, to wit, on the fourth day of March, 1878, at, to wit, Canton, at, to wit, the district aforesaid, according to the usage and custom of merchants, made their further certain bill of exchange in writing, bearing date the day and year aforesaid, and then and there directed the said bill of exchange to Mr. W. D.
13 Turner, Ju'r, Liverpool, and then and there requested said W. D.
Turner, Ju'r, sixty days after sight of that their first of exchange (second and third of the same tenor unpaid), to pay to the order of themselves, under the style of "ourselves," in London, the sum of eight hundred pounds sterling (£800.00), for value received, which said bill of exchange the said W. D. Turner, Ju'r, afterwards, to wit, on the day and year aforesaid, at, to wit, the district aforesaid, upon sight thereof, accepted according to said usage and custom of merchants, payable at Messrs. Barclay & Co., bankers, London, due 21st May, and the said defendants, to whom or to whose order the payment of the said sum of money in the said bill specified was to be made, after the making of the said bill, and before the payment of the said sum of money, to wit, on the day and year aforesaid, at, to wit, the district aforesaid, duly endorsed the said bill under the style of Humphrey Bell & Co., and thereby then and there ordered and appointed the said sum of money to be paid to First National Bank, Canton, Ill., or order, and then and there delivered said bill to said First National Bank of Canton, and the said First National Bank of Canton, to whom or to whose order the payment of said sum of money was to be made, after the making of said bill
14 and before the payment of said money, to wit, on the day
and year aforesaid, at, to wit, the district aforesaid, duly endorsed said bill under the style of First National Bank, Canton, Ill., C. T. Heald, cashier, and thereby then and there ordered and appointed said sum of money to be paid to said plaintiff, and then and there delivered said bill to said plaintiff. And the plaintiff avers that afterwards, when the said bill became due and payable, according to the tenor and effect thereof, and of said acceptance, to wit, on May 21st, 1878, at said Messrs. Barclay & Co., bankers, London, said bill was duly presented and shown for payment thereof, and payment of said sum of money was then and there requested, but that neither said Messrs. Barclay & Co. nor said W. D. Turner, Ju'r, nor any person or persons on behalf of said W. D. Turner, Ju'r, did or would then, or at any time before or afterwards, pay said sum of money or any part thereof, but then and there wholly neglected and refused so to do, nor did the said W. D. Turner, Ju'r, or any person on his behalf, pay said first and second of exchange in said bill mentioned, or either of them, but therein wholly failed and made default, and thereupon afterwards, to wit, on May 21st, 1878, aforesaid, said bill was duly pro-
15 tested for non-payment thereof, of all which said several
premises the said defendants, afterwards, to wit, on the day and year last aforesaid, at, to wit, the district aforesaid, had notice by means whereof, and according to the usage and custom of merchants, said defendants then and there became liable to pay to said plaintiff the said sum of money in said bill specified, when they

should be thereunto afterwards requested, and being so liable said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at, to wit, the district aforesaid, undertook and then and there faithfully promised the plaintiff to pay it said sum of money in said bill specified when they, the defendants, should be thereunto afterwards requested.

And whereas, also, the said defendants, under the name and style of Humphrey Bell & Co., heretofore, to wit, on the eleventh day of March, 1878, at, to wit, Canton, at, to wit, the district aforesaid, according to the usage and custom of merchants, made their certain bill of exchange in writing, bearing date the day and year aforesaid, and then and there directed the said bill of exchange to Mr. W. D. Turner, Ju'r,
34 Harrington street, Liverpool, and thereby then and there
16 requested said W. D. Turner, Ju'r, sixty days after sight of
that their first of exchange (second and third of the same tenor unpaid), to pay to the order of themselves, under the style of "ourselves," in London, the sum of eight hundred pounds sterling (£800 0 0), for value received, which said bill of exchange the said W. D. Turner, Ju'r, afterwards, to wit, on the day and year aforesaid, at, to wit, the district aforesaid, upon sight thereof, accepted, according to said usage and custom of merchants, payable at Messrs. Barclay & Co., bankers, London, due 31st May, and the said defendants, to whom or to whose order the payment of the said sum of money in the said bill specified was to be made, after the making of the said bill and before the payment of the said sum of money, to wit, on the day and year aforesaid, at, to wit, the district aforesaid, duly endorsed the said bill under the style of Humphrey Bell & Co., and thereby then and there ordered and appointed the said sum of money to be paid to First National Bank, Canton, Ill., or order, and then and there delivered said bill to said First National Bank of Canton; and the said First National Bank of Canton, to whom or to whose order the payment of said sum of money was to be made,
after the making of said bill and before the payment of said
17 money, to wit, on the day and year aforesaid, at, to wit, the
district aforesaid, duly endorsed said bill under the style of First National Bank, Canton, Ill., C. T. Heald, cashier, and thereby then and there ordered and appointed said sum of money to be paid to said plaintiff, and then and there delivered said bill to said plaintiff. And the plaintiff avers that afterwards when the said bill became due and payable according to the tenor and effect thereof and of said acceptance, to wit, on May 31st, 1878, at said Messrs. Barclay & Co., bankers, London, said bill was duly presented and shown for payment thereof, and payment of said sum of money was then and there required; but that neither said Messrs. Barclay & Co., nor said W. D. Turner, Ju'r, nor any person or persons on behalf of said W. D. Turner, Ju'r, did or would, then or at any time before or afterwards, pay said sum of money, or any part thereof, but then and there wholly neglected and refused so to do; nor did the said W. D. Turner, Ju'r, or any person on his behalf, pay said second and third of exchange in said bill mentioned, or either of them, but therein wholly failed and made default, and thereupon

afterwards, to wit, on May 31st, 1878, aforesaid, said bill was
18 duly protested for non-payment thereof; of all which said
several premises the said defendants afterwards, to wit, on the day and year last aforesaid, at, to wit, the district aforesaid, had notice, by means whereof, and according to the usage and custom of merchants, said defendants then and there became liable to pay to said plaintiff the said sum of money in said bill specified when they should be thereunto afterwards requested, and, being so liable, said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at, to wit, the district aforesaid, undertook, and then and there faithfully promised the plaintiff, to pay it, said sum of money in said bill specified, when they, the defendants, should be thereunto afterwards requested.

And whereas, also, the said defendants afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and request of the said defendants, sold and delivered to the said defendants divers other goods, wares, and merchandise of the said plaintiff, the said defendants then and there undertook and faithfully promised the said plaintiff that the said defendant would well
and truly pay to the said plaintiff so much money as the last
19 aforesaid goods, wares, and merchandise at the time of the
sale and delivery thereof were reasonably worth when the said defendant should be thereunto afterwards requested, and the said plaintiff avers that the said goods, wares, and merchandise last mentioned at the time of the sale and delivery thereof were reasonably worth the further sum of fifteen thousand dollars of like lawful money, as aforesaid, to wit, at the place aforesaid, whereof the said defendant afterwards on the same day and year and at the place aforesaid had notice.

And whereas, also, the said defendants afterwards, to wit, on the same day and year and at the place aforesaid, were indebted to the said plaintiff in the further sum of fifteen thousand dollars of like lawful money, as aforesaid, for money before that time lent and advanced by the said plaintiff to the said defendants, and at the like request of the said defendants, and in the like sum for other money by the said plaintiff before that time paid, laid out, and expended for the said defendants, and at the like request of the said defendants; and in the like sum for other money by the said defendant before that time had and received to and for the use of the said plaintiff.

And in the like sum for other money before that time and
20 then due and owing the said plaintiff for interest upon and
for the forbearance of divers other sums of money before that time, and then due and owing from said defendants to said plaintiff. And in the like sum for the price and value of work then done and material for the same provided by the said plaintiff for the said defendant, and at the like special request of the said defendants.

And being so indebted the said defendants, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned, when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendants afterwards, to wit, on the day and year last aforesaid, and at the place last aforesaid, accounted, together with the said plaintiff, of and concerning divers other sums of money before that time due and owing from the said defendants to the said plaintiff, and then and there being in arrears and unpaid, and upon such accounting the said defendants then and there were
found to be in arrear and indebted to the said plaintiff in the
21 further sum of fifteen thousand dollars of like lawful money
as aforesaid.

And being so found in arrears and indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendants should be thereunto afterwards requested. Nevertheless the said defendants (although often requested, etc.,) have not yet paid the said several sums of money above and in said bills mentioned, or any or either of them, or any part thereof to the said plaintiff, but to pay the same, or any part thereof, to the said plaintiff, the said defendants have hitherto altogether refused, and still do refuse, to the damage of the said plaintiff of fifteen thousand dollars; and therefore the said plaintiff brings suit, etc.

HITCHCOCK, DUPEE & JUDAH,
*Plaintiff's Attorneys.*

*Copy of Instrument and Account Sued on.*

Exchange for £850 | 0 | 0.

Canton, Ill., *March 4th*, 1878.

Sixty days after sight of this first of exchange (second and
22 third unpaid), pay to the order of ourselves, in London, eight
hundred and fifty pounds sterling, value received, and
charge to account of—

HUMPHREY BELL & CO.

To Mr. W. D. Turner, Ju'r, Liverpool.

[Endorsed across the face:] Accepted. Payable at Messrs. Barclay & Co., bankers, London. Due 21st May. W. D. Turner, Ju'r.

[Stamp:] First National Bank, Chicago. 7984.

[Stamp, 5 shillings. Stamp, 4 shillings.]

(Endorsed:) Pay First National Bank, Canton, Ill., or order. Humphrey Bell & Co. Pay First Nat'l Bank, Chicago, or order, for collection, acc't of First National Bank, Canton, Ill. C. T. Heald, cashier.

Exchange for £800 | 0 | 0.

CANTON, ILL., *March 4th*, 1878.

Sixty days after sight of this first of exchange (second and third unpaid), pay to the order of ourselves, in London, eight hundred pounds sterling, value received, and charge to account of—

HUMPHREY BELL & CO.

To Mr. W. D. Turner, Jr., Liverpool.

[Endorsed across the face:] Accepted. Payable at Messrs. Barclay & Co., bankers, London. Due 21st May. W. D. Turner, Jun'r.

[Stamp:] First National Bank, Chicago. No. 7983.

[Stamp, 4 shillings. Stamp, 4 shillings.]

(Endorsed:) Pay First National Bank, Canton, Ill., or order.
23 Humphrey Bell & Co. Pay First Nat'l Bank, Chicago, or
order, for collection, acc't of First National Bank, Canton, Ill.
C. T. Heald, cashier.

Exchange for £800 | 0 | 0.

CANTON, ILL., *March 11th*, 1878.

Sixty days after sight of this first of exchange (second and third unpaid), pay to the order of ourselves, in London, eight hundred pounds sterling, value received, and charge to account of—

HUMPHREY BELL & CO.

To W. D. Turner, Jun'r, 34 Harrington street, Liverpool.

[Endorsed across the face:] Accepted. Payable at Messrs. Barclay & Co., bankers, London. Due 31st May. W. D. Turner, Jr.

[Stamp:] First National Bank, Chicago. 8107.

[Stamp, 4 shillings. Stamp, 4 shillings.]

(Endorsed:) Pay First National Bank, Canton, Ill., or order. Humphrey Bell & Co. Pay First Nat'l Bank, Chicago, or order, for collection, acc't of First National Bank, Canton, Ill. C. T. Heald, cashier.

*Humphrey Bell & Co. to First National Bank of Chicago, Dr.*

| | |
|---|---|
| To goods, wares, and merchandise sold and delivered | $11,000 |
| To money lent and advanced | $11,000 |
| To money paid, laid out, and expended | $11,000 |
| To money had and received to and for the use of said plaintiff | $11,000 |
| To money due for interest and forbearance | $11,000 |
| To labor, services, and material | $11,000 |
| To balance due on account stated | $11,000 |

(Endorsed:) Filed this 6th day of December, 1878. Wm. H. Bradley, clerk.

24 Afterwards, to wit, on the eighteenth day of December, A. D. 1878, came the defendants, by their attorneys, and filed in said clerk's office their pleas in said entitled cause, which said pleas are in the words and figures following, to wit:

*Plea of Hiram A. Whitnah.*

In the Circuit Court of the United States for the Northern District of Illinois. To the December Term, A. D. 1878.

UNITED STATES OF AMERICA, }
*Northern District of Illinois,* } *ss:*

HIRAM A. WHITNAH, impleaded with HUMPHREY BELL and ANDREW J. WHITNAH,
*ads.*
THE FIRST NATIONAL BANK OF CHICAGO. } Assumpsit.

And the said defendant, Hiram A. Whitnah, impleaded, etc., by Hoyne, Horton & Hoyne, his attorneys, comes and defends the wrong and injury when, etc., and saith that he, together with the said Humphrey Bell and Andrew J. Whitnah, did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him; and of this the said defendant, the said Hiram A. Whitnah, puts himself upon the country, etc. 25

HOYNE, HORTON & HOYNE,
*Att's for Def't, Hiram A. Whitnah.*

(Endorsed:) Filed Dec. 18, 1878. Wm. H. Bradley, cl'k.

*Plea of Humphrey Bell.*

In the Circuit Court of the United States for the Northern District of Illinois. To the December Term, A D. 1878.

UNITED STATES OF AMERICA, }
*Northern District of Illinois,* } *ss:*

HUMPHREY BELL, impleaded with HIRAM A. WHITNAH and ANDREW J. WHITNAH,
*ads.*
THE FIRST NATIONAL BANK OF CHICAGO. } Assumpsit.

And the said defendant, Humphrey Bell, impleaded, etc., by Hoyne, Horton and Hoyne, his attorneys, comes and defends the wrong and injury when, etc., and saith that he, together with the said Hiram A. Whitnah and Andrew J. Whitnah, did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him; and of this the said defendant, the said Humphrey Bell, puts himself upon the country, etc. 26

HOYNE, HORTON & HOYNE,
*Att'ys for Def't, Humphrey Bell.*

(Endorsed:) Filed Dec. 18, '78. Wm. H. Bradley, cl'k.

### *Plea of Andrew J. Whitnah.*

In the Circuit Court of the United States for the Northern District of Illinois. To the December Term, A. D. 1878.

UNITED STATES OF AMERICA,
*Northern District of Illinois,* } *ss:*

ANDREW J. WHITNAH, impleaded with HUMPHREY BELL
and HIRAM A. WHITNAH,
*ads.*
THE FIRST NATIONAL BANK OF CHICAGO. } Assumpsit.

And the said defendant, Andrew J. Whitnah, impleaded, etc., by Hoyne, Horton & Hoyne, his attorneys, comes and defends the wrong and injury when, etc., and saith that he, together with the said Humphrey Bell and Hiram A. Whitnah, did not undertake or promise in manner and form as the said plaintiff hath above 27 thereof complained against him; and of this the said defendant, Andrew J. Whitnah, puts himself upon the country, etc.

HOYNE, HORTON & HOYNE,
*Att's for Def't, Andrew J. Whitnah.*

(Endorsed:) Filed Dec. 18, 1878. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the fourteenth day of May, A. D. 1879, came the said defendants, by their attorneys, and filed in said clerk's office their pleas in said entitled cause, which said pleas are in the words and figures following, to wit:

### *Pleas.*

In the Circuit Court of the United States for the Northern District of Illinois. To the May Term, A. D. 1879.

UNITED STATES OF AMERICA,
*Northern District of Illinois,* } *ss:*

HUMPHREY BELL, HIRAM A. WHITNAH, and ANDREW
J. WHITNAH, Copartners, etc.,
*ads.*
THE FIRST NATIONAL BANK OF CHICAGO. } Assumpsit.

1st. And the said defendants, by Hoyne, Horton and Hoyne, 28 their attorneys, come and defend the wrong and injury, when, etc., and say *actio non*, because they say that after the making of the promises in said several counts of said declaration mentioned, and before the commencement of this suit, to wit, on, etc., the defendants paid to the plaintiff divers sums of money, amounting, to wit, to all the money in the said counts in said declaration mentioned, in full satisfaction and discharge of all causes and rights of action mentioned in said declaration, which payment the plaintiff did then accept of and from the defendants in such full satisfaction and discharge as aforesaid, and this the defendants are ready to verify. Wherefore they pray judgment, etc.

HOYNE, HORTON & HOYNE,
*Attorneys for Defendants.*

2d. And for further plea in this behalf to the first, second, and third counts of the said plaintiff's said declaration, said defendants say *actio non*, because they say that the payment of the bills of exchange in said counts described was secured by property of the said defendants, to wit, three hundred and sixty (360) boxes of bacon, of great value, to wit, of the value of fifteen thousand dollars; that bills of lading for the said property were attached to the said bills of exchange at, to wit, the time and place of the indorsement
29 of said bills of exchange to said plaintiff, as set forth in said declaration, and were delivered to said plaintiff as security as aforesaid, and that the said bills of lading afterwards, to wit, at the place last aforesaid, on, to wit, the day last aforesaid, were detached by the said plaintiff and delivered without the knowledge or consent of these defendants to one Alfred Jacks, and said Jacks thereupon, on, to wit, the day last aforesaid, at, to wit, the place last aforesaid, converted the property to his own use, and that afterwards, on, to wit, the same day, at, to wit, place last aforesaid, the said Alfred Jacks failed and became wholly insolvent, whereby the said property above and in said bills of lading described became and was wholly lost to the said defendants, and this they, the said defendants, are ready to verify. Wherefore they pray judgment, etc.

HOYNE, HORTON & HOYNE,
*Attorneys for Defendants.*

3. And for further plea to the said first, second, and third counts of the said plaintiff's said declaration, said defendants say *actio non*, because they say that the payment of the bills of exchange in said counts described was secured by other property of the said defendants of great value, to wit, three hundred and sixty (360) boxes of bacon, of the value of, to wit, fifteen thousand dollars, and
30 the possession thereof was, at, to wit, the time of the delivery of the said bills of exchange, delivered to said plaintiff.

And the defendants aver that the plaintiff did not retain the said property, and did not dispose of the same for the benefit of the said defendants, and apply the proceeds toward the payment of the said drafts or bills of exchange, but that, on the contrary thereof, so negligently conducted itself in and about the management and care of the said property, that said property became and was wholly lost to the said defendants. And this they, the said defendants, are ready to verify. Wherefore they pray judgment, &c.

HOYNE, HORTON & HOYNE,
*Attorneys for Defendants.*

4. And for further plea to the said first, second, and third counts of the said plaintiff's said declaration, said defendants say *actio non*, because they say that the payment of the bills of exchange in said

counts described was secured by other property of the said defendants of great value, to wit, three hundred and sixty (360) boxes of bacon, of the value of, to wit, fifteen thousand dollars, and the possession thereof was, at, to wit, the time and place of the delivery of said bills of exchange, delivered to said plaintiff.

And the defendants aver that the plaintiff did not retain the said property, and did not dispose of the same for the benefit 31 of the said defendants, and apply the proceeds toward the payment of the said bills of exchange, but that, on the contrary thereof, converted and disposed of the same to its own use at, to wit, the time and place last aforesaid, whereby the said property became wholly lost to the said defendants.

And this they, the said defendants, are ready to verify. Wherefore they pray judgment, etc,

HOYNE, HORTON & HOYNE,
*Attorneys for Defendants.*

5. And for further plea in this behalf the defendants say *actio non*, because they say that the said plaintiff, before and at the time of the commencement of this suit, to wit, at the county aforesaid, was and still is indebted to the said defendants in a large sum of money, to wit, the sum of fifteen thousand dollars, of lawful money of the United States, for the work and labor, care, diligence and attendance of the said defendants by the said defendants and their servants before that time performed and bestowed in and about the business of the said plaintiff, and for the said plaintiff and at its request; and for divers materials and other necessary things by the said defendants before that time found and provided and used and applied in and about the said work and labor for the said plaintiff and its like request; and for for divers goods, wares, and merchandise sold and delivered by the said defendants to the said plaintiff, at its like special instance and request, for which said plaintiff then and there undertook 32 and faithfully promised to pay so much money as the last aforesaid goods, wares, and merchandise, at the time of the sale and delivery thereof, were reasonably worth, when the said plaintiff should be thereunto afterwards requested; and for divers goods, wares, and merchandise sold and delivered by the said defendants to the said plaintiff and at its like request, and for money by the said defendants before that time lent and advanced to and paid, laid out, and expended for the said plaintiff, and at its like request.

And for money by the said plaintiff before that time had and received to and for the use of the said defendants. And for money due and owing from the said plaintiff to the said defendants, for interest upon and for the forbearance of divers large sums of money due and owing from the said plaintiff to the said defendants, and by the said defendants forborne to the said plaintiff for divers long spaces of time before then elapsed. And for money due and owing from the said plaintiff to the said defendants upon an account stated between them.

Which said sum of money so due and owing to the said defendants as aforesaid exceeds the damages sustained by the said plaintiff, 33 by reason of the non-performance by the said defendants of the said several supposed promises and undertakings in the said declarations mentioned, and out of which said sum of money so due and owing from the said plaintiff to the said defendants, the said defendants are ready and willing, and hereby offer, to set off and allow to the said plaintiff the full amount of the said damages, according to the form of the statute in such case made and provided.

And this they, the said defendants, are ready to verify. Wherefore they pray judgment, etc.

HOYNE, HORTON & HOYNE,
*Attorneys for Defendants.*

*Statement of Account Sued on.*

The First National Bank to Humphrey Bell & Co., Dr.

| | | |
|---|---|---|
| [B] 40 boxes short backs (H. Bell & Co.) 465 pcs., 21,512 lbs., 6¼ | 1,344 | 50 |
| [A] 20 boxes short bellies, 648 pcs., 11,199 lbs., 6¾ | 755 | 92 |
| [E] 20 boxes Stretfords, 318 pcs., 9,785 lbs., 7¼ | 709 | 41 |
| [G] 25 boxes long cut hams, 864 pcs., 13,854 lbs., 8¼ | 1,142 | 95 |
| [C] 15 boxes long rib middles, 299 pcs., 7,336 lbs., 8 | 586 | 88 |
| [D] 30 boxes Yorkshires, 368 pcs., 15,483 lbs., 6¾ | 1,045 | 10 |
| 34 [H] 10 boxes long clears, 104 pcs., 5,785 lbs., 5¾ | 332 | 63 |
| [I] 40 boxes shoulders, 1,022 pcs., 22,562 lbs., 4¼ | 958 | 88 |
| [J] 20 boxes short clears, 189 pcs., 11,497 lbs., 6 | 688 | 74 |
| [K] 20 boxes short hams, 529 pcs., 11,512 lbs., 7¾ | 892 | 18 |
| | 8,457 | 19 |

And:

| | | |
|---|---|---|
| [O] 25 boxes Stretfords, 412 pcs., 12,185 lbs., 6¾ | 822 | 48 |
| [S] 10 boxes short backs, 127 pcs., 5,556 lbs., 5¾ | 319 | 47 |
| [U] 5 boxes short bellies, 206 pcs., 2,870 lbs., 6¼ | 179 | 37 |
| [L] 20 boxes short hams, 523 pcs., 11,102 lbs., 7¼ | 804 | 90 |
| [M] 15 boxes long hams, 508 pcs., 8,271 lbs., 8 | 661 | 68 |
| [N] 5 boxes Staffordshire hams, 186 pcs., 2,809 lbs., 8 | 224 | 72 |
| [R] 20 boxes Yorkshire, 255 pcs., 10,347 lbs., 6 | 620 | 82 |
| [P] 10 boxes long rib middles, 188 pcs., 4,741 lbs., 7½ | 355 | 57 |
| [Q] 10 boxes long backs, 138 pcs., 5,948 lbs., 5½ | 327 | 14 |
| | 4,416 | 15 |

The First National Bank to Humphrey Bell & Company, Dr.

| | | |
|---|---|---|
| 35 For work and labor and materials | $15,000 | 00 |
| For goods, wares, and merchandise | | |
| For money lent and advanced | | |
| For money paid, laid out, and expended | | |
| For money had and received to use of defendants | | |
| For money for interest and forbearance | | |
| For money due upon account stated | | |

36 UNITED STATES OF AMERICA, } *ss*:
*Northern District of Illinois*, }

In the Circuit Court of the United States for the Northern District of Illinois. To the May Term, A. D. 1879.

HIRAM A. WHITNAH, impleaded with HUMPHREY BELL and ANDREW J. WHITNAH,
*ads.*
THE FIRST NATIONAL BANK OF CHICAGO. } Assumpsit.

And for further plea in this behalf the said defendant, Hiram A. Whitnah, impleaded with said Humphrey Bell and Andrew J. Whitnah, for himself says *actio non*, because he says that he, together with the said Humphrey Bell and Andrew J. Whitnah, did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him, and of this the said defendant, the said Hiram A. Whitnah puts himself upon the country, etc.

HIRAM A. WHITNAH.

STATE OF ILLINOIS, } *ss*:
*County of Fulton*, }

Hiram A. Whitnah, being first duly sworn, deposes and
37 says that he is the defendant above named, and that the plea above by him pleaded is true in substance and in fact.

Subscribed and sworn to before me, this 28th day of April, A. D. 1879.

[SEAL.] CLIFTON N. HENKLE,
*Notary Public.*

HOYNE, HORTON & HOYNE,
*Attorneys for Defendant, Hiram A. Whitnah.*

2. And for further plea to the said first, second, and third counts of the said plaintiff's declaration, said defendant, Hiram A. Whitnah, comes and craves oyer of the said supposed bills of exchange in the said counts of the said declaration mentioned, and they are read to him, &c.; he also craves oyer of the indorsements upon the said bills of exchange, respectively, and they are read to him in these words:

Upon the supposed bill of exchange in the said first count:

"Pay First National Bank, Canton, Ill., or order.
HUMPHREY BELL & CO."

"Pay First Nat'l Bank, Chicago, or order, for collection acc't of First National Bank, Canton, Ill.
C. T. HEALD, *Cashier.*"

Upon the supposed bill of exchange in the said second count:

38 "Pay First National Bank, Canton, Ill., or order.
HUMPHREY BELL & CO."

"Pay First Nat'l Bank, Chicago, or order, for collection acc't of First National Bank, Canton, Ill.
C. T. HEALD, *Cashier.*"

Upon the supposed bill of exchange in the said third count:

"Pay First National Bank, Canton, Ill., or order.
HUMPHREY BELL & CO."

"Pay First Nat'l Bank, Chicago, or order, for collection acc't of First National Bank, Canton, Ill.
C. T. HEALD, *Cashier*."

Which being read and heard the said defendant, Hiram A. Whitnah, says *actio non*, because he says that at the time of the making of the said supposed bills of exchange the said defendants were copartners, under a special agreement or contract of partnership; that their said contract of partnership contained a stipulation regarding the borrowing of money to the effect, to wit, that said defendants, Hiram A. Whitnah and Andrew J. Whitnah, should be consulted by said defendant, Humphrey Bell, on all loan matters before firm name should be used where any considerable amount was borrowed, and individual members of the said firm should sign for themselves for loans negotiated, and that there was no other stipulation in said agreement in that behalf.

39 This defendant further avers that the said supposed bills of exchange in the said declaration described at, to wit, the time and place in said declaration mentioned were executed, indorsed, and delivered by the said defendant, Humphrey Bell, to the First National Bank of Canton, a corporation created and existing under and by virtue of the laws of the United States, for money loaned to the defendant, Humphrey Bell, by the said The First National Bank of Canton, and for no other or different consideration whatever.

This defendant further avers that he did not sign the said supposed bills of exchange, but the same were signed by the said defendant, Humphrey Bell, in the name of their said copartnership, without the consent or knowledge of this defendant.

This defendant further avers that the said The First National Bank of Canton had full actual knowledge of the said copartnership contract and the terms thereof, and the stipulation in regard to borrowing money hereinbefore mentioned, and the said The First National Bank of Canton well knew and had full notice that the said supposed bills of exchange were executed and indorsed by said Humphrey Bell, for the purposes and in the manner aforesaid, without the
consent or knowledge of this defendant, to wit, at the time
40 and place of the delivery of said supposed bills of exchange
to it [the] said The First National Bank of Canton.

And this defendant further avers that the said plaintiff is not the owner of the said supposed bills of exchange or either of them, but, on the contrary thereof, the said bills of exchange are the property of said The First National Bank of Canton.

And this the said defendant, Hiram A. Whitnah, is ready to verify. Wherefore he prays judgment, etc.

HOYNE, HORTON & HOYNE,
*Attorneys for Defendant, Hiram A. Whitnah.*

3. And for further plea to the said first, second, and third counts of the said plaintiff's said declaration, said defendant, Hiram A. Whitnah, says *actio non*, because he says that at the time of the making of the said supposed bills of exchange the said defendants were copartners under a special agreement or contract of partnership; that their said contract of partnership contained a stipulation regarding the borrowing of money to the effect, to wit, that said defendants, Hiram A. Whitnah and Andrew J. Whitnah, should be consulted by said defendant, Humphrey Bell, on all loan matters before firm name should be used where any considerable amount was borrowed, and individual members of the said firm should sign for themselves for loans negotiated, and that there was no
41 other stipulation in said agreement in that behalf.

This defendant further avers that the said supposed bills of exchange in the said declaration described at, to wit, the time and place in said declaration mentioned, were executed, indorsed, and delivered by the said defendant, Humphrey Bell, to The First National Bank of Canton, a corporation created and existing under and by virtue of the laws of the United States, for money loaned by said The First National Bank of Canton to said defendant, Humphrey Bell, and for no other or different consideration whatever.

This defendant further avers that he did not sign the said supposed bills of exchange, but the same were signed by the said defendant, Humphrey Bell, in the name of their said corpartnership without the consent or knowledge of this defendant.

This defendant further avers that the said The First National Bank of Canton had full actual knowledge of the said copartnership contract, and the terms thereof and the stipulation in regard to borrowing money hereinbefore mentioned, and that said The First National Bank of Canton well knew and had full notice that the said supposed bills of exchange were executed and indorsed by said Humphrey Bell, for the purposes and in the manner afore-
42 said, without the consent or knowledge of this defendant, to wit, at the time and place of the delivery of said supposed bills of exchange to it [the] said The First National Bank of Canton, of all which this defendant avers before and at the time of the indorsement of the said supposed bills of exchange to the said plaintiff, as alleged in the said counts of the said declaration, the said plaintiff had notice, to wit, at the county aforesaid.

And this the said defendant, Hiram A. Whitnah, is ready to verify. Wherefore he prays judgment, etc.

HOYNE, HORTON & HOYNE,
*Attorneys for Defendant, Hiram A. Whitnah.*

4. And for further plea to the said first, second, and third counts of the said plaintiff's said declaration, said defendant, Hiram A. Whitnah, says *actio non*, because he says that at the time of the making of the said supposed bills of exchange the said defendants were copartners under a special agreement or contract of partnership; that their said contract of partnership contained a stipulation regarding the borrowing of money to the effect, to wit, that

said defendants, Hiram A. Whitnah and Andrew J. Whitnah, should
be consulted by said defendant, Humphrey Bell, on all loan matters
before firm name should be used where any considerable
43 amount was borrowed, and individual members of the said firm
should sign for themselves for loans negotiated, and that there
was no other stipulation in said agreement in that behalf.

This defendant further avers that the said supposed bills of exchange in the said declaration described at, to wit, the time and place in said declaration mentioned were executed, indorsed, and delivered by the said defendant, Humphrey Bell, to The First National Bank of Canton, a corporation created and existing under and by virtue of the laws of the United States, for money loaned to the defendant, Humphrey Bell, by the said The First National Bank of Canton, and for no other or different consideration whatever.

This defendant further avers that he did not sign the said supposed bills of exchange, but the same were signed by the said defendant, Humphrey Bell, in the name of their said copartnership, without the consent or knowledge of this defendant.

This defendant further avers that the said The First National
Bank of Canton had full actual knowledge of the said copartnership
contract and the terms thereof, and the stipulation in regard to borrowing money hereinbefore mentioned, and that said The First National Bank of Canton well knew and had full notice that
44 the said supposed bills of exchange were executed and in-
dorsed by said Humphrey Bell for the purposes and in the
manner aforesaid, without the consent or knowledge of this defendant, to-wit, at the time and place of the delivery of said supposed
bills of exchange to it, said The First National Bank of Canton.

And this defendant further avers that the said plaintiff is not a *bona fide* holder for value of the said bills of exchange, or either of them, but that, on the contrary thereof, the said plaintiff holds the same for collection, and its possession and title are merely colorable, and by arrangement with The First National Bank of Canton to prevent this defendant from setting up his defence.

And this the said defendant, Hiram A. Whitnah, is ready to verify. Wherefore he prays judgment, etc.

HOYNE, HORTON & HOYNE,
*Attorneys for Defendant, Hiram A. Whitnah.*

5. And for further plea to the said first, second, and third counts
of the said plaintiff's said declaration, said defendant, Hiram A.
Whitnah, says *actio non*, because he says that before and at the time
of the making of the said supposed bills of exchange the said defendants were copartners under a special contract or agree-
45 ment of partnership entered into on, to wit, the twenty-first
day of November, A. D. 1877, at, to wit, the county aforesaid;
that afterwards and on, to wit, the day and year last aforesaid, at, to wit, the place last aforesaid, the said defendants made certain arrangements with The First National Bank of Canton, a corporation created and existing under and by virtue of the laws of the United States, regarding advances of money to be made by said The

First National Bank of Canton to said defendants to the effect, to wit, that in all cases of loans or advances of money the said defendants should sign all notes, drafts, or other obligations therefor individually, each for himself, and that in all foreign drafts accompanied by bills of lading of merchandise shipped said The First National Bank of Canton should look for repayment to the avails of such shipments and to the defendant, Humphrey Bell; and that this defendant, having no experience in or acquaintance with the business of shipments to foreign markets and drafts against the same, should not be liable upon any such drafts made by the said defendant, Humphrey Bell, in the name of their said copartnership.

This defendant further avers that he did not execute the said
46 supposed bills of exchange, but that the same were executed
and delivered by the said defendant, Humphrey Bell, in the name of their said copartnership, without the knowledge or consent of this defendant, and were accompanied by bills of lading for certain property shipped to foreign market, to wit, to Liverpool, England, such property being, to wit:

Three hundred and sixty (360) boxes of bacon of great value, to wit, of the value of thirteen thousand dollars, and were drafts against shipments to foreign markets.

This defendant further avers that said The First National Bank of Canton had full knowledge of the character of said supposed bills of exchange, and the purposes for which they were intended, and said defendant further avers that the bills of lading for the shipments aforesaid were attached to said drafts, and were delivered with said drafts, at the time of the delivery of said drafts to said The First National Bank of Canton by said defendant, Humphrey Bell, to wit, at the place last aforesaid.

And this defendant avers that the said plaintiff is not the owner of said supposed bills of exchange or either of them, but, on the contrary thereof, the said supposed bills of exchange are the property of
said The First National Bank of Canton.
47 And this the said defendant, Hiram A. Whitnah, is ready
to verify. Wherefore he prays judgment, etc.

HOYNE, HORTON & HOYNE,
*Attorneys for Defendant, Hiram A. Whitnah.*

6. And for further plea to the said first, second, and third counts of the said plaintiff's said declaration, said defendant, Hiram A. Whitnah, says *actio non*, because he says that before and at the time of the making of the said supposed bills of exchange the said defendants were copartners under a special contract or agreement of partnership entered into on, to wit, the twenty-first day of November, A. D. 1877, at, to wit, the county aforesaid; that afterwards and on, to wit, the day and year last aforesaid, at, to wit, the place last aforesaid, the said defendants made certain arrangements with The First National Bank of Canton, a corporation created and existing under and by virtue of the laws of the United States, regarding advances of money to be made by said The First National Bank of Canton to said defendants, to the effect, to wit, that in all cases of loans or ad-

vances of money the said defendants should sign all notes, drafts, or other obligations therefor individually, each for himself;
48 and that in all foreign drafts accompanied by bills of lading for merchandise shipped said The First National Bank of Canton should look for repayment to the avails of such shipments, and to the defendant, Humphrey Bell; and that this defendant, having no experience in, or acquaintance with, the business of shipping merchandise to foreign markets, and drawing drafts against the same, should not be liable upon any such drafts made by the said defendant, Humphrey Bell, in the name of their said copartnership.

This defendant further avers that he did not execute the said supposed bills of exchange, but that the same were executed and delivered by the said defendant, Humphrey Bell, in the name of their said copartnership, without the knowledge or consent of this defendant, and were accompanied by bills of lading for certain property shipped to foreign market, to wit, to Liverpool, England, such property being, to wit:

Three hundred and sixty boxes of bacon, of great value, to wit, of the value of thirteen thousand dollars, and were drafts against shipments to foreign markets.

This defendant further avers that said The First National Bank of Canton had full knowledge of the character of said sup-
49 posed bills of exchange and the purpose for which they were intended; and said defendant further avers that the bills of lading for the shipments aforesaid were attached to said supposed bills of exchange, and were delivered with said supposed bills of exchange at the time of the delivery thereof to said The First National Bank of Canton by said defendant, Humphrey Bell, to wit, at the place last aforesaid, of all which this defendant avers before and at the time of the indorsement of the said supposed bills of exchange to the said plaintiff, as alleged in the said counts of the said declaration, the said plaintiff had notice, to wit, at the county aforesaid.

And this the said defendant, Hiram A. Whitnah, is ready to verify. Wherefore he prays judgment, etc.

HOYNE, HORTON & HOYNE,
*Attorneys for Defendant, Hiram A. Whitnah.*

50 In the Circuit Court of the United States for the Northern District of Illinois. To the May Term, A. D. 1879.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

ANDREW J. WHITNAH, impleaded with HUMPHREY BELL and HIRAM A. WHITNAH,
*ads.*
THE FIRST NATIONAL BANK OF CHICAGO. } Assumpsit.

And for further plea in this behalf, the said defendant, Andrew J. Whitnah, impleaded with said Humphrey Bell and Hiram A. Whitnah, for himself says *actio non*, because he says that he, together with the said Humphrey Bell and Hiram A. Whitnah, did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against them and of this the said defendant, the said Andrew J. Whitnah, puts himself upon the country, etc.

ANDREW J. WHITNAH.

STATE OF ILLINOIS, }
*County of Fulton,* } *ss:*

51 Andrew J. Whitnah, being first duly sworn, deposes and says: That he is the defendant above named, and that the plea above by him pleaded is true in substance and in fact.

ANDREW J. WHITNAH.

Subscribed and sworn to before me, this 28th day of April, A. D. 1879.

[SEAL.] CLIFTON N. HENKLE,
*Notary Public.*

HOYNE, HORTON & HOYNE,
*Attorneys for Defendant, Andrew J. Whitnah.*

2. And for further plea to the said first, second, and third counts of the said plaintiff's declaration, said defendant, Andrew J. Whitnah, comes and craves oyer of the said supposed bills of exchange in the said counts of the said declaration mentioned, and they are read to him, &c. He also craves oyer of the indorsements upon the said bills of exchange, respectively, and they are read to him, in these words:

Upon the supposed bill of exchange in the first count:

"Pay First National Bank, Canton, Ill., or order.
"HUMPHREY BELL & CO."

"Pay First Nat'l Bank, Chicago, or order, for collection, acc't First National Bank, Canton, Ill.
"C. T. HEALD, *Cashier.*"

52 Upon the supposed bill of exchange in the second count:

"Pay First National Bank, Canton, Ill., or order.
"HUMPHREY BELL & CO."

"Pay First Nat'l Bank, Chicago, or order, for collection, acc't of First National Bank, Canton, Ill.
"C. T. HEALD, *Cashier.*"

Upon the supposed bill of exchange in the said third count:

"Pay First National Bank, Canton, Ill., or order.
"HUMPHREY BELL & CO."

"Pay First National Bank, Chicago, or order, for collection, acc't of First National Bank, Canton, Ill.
"C. T. HEALD, *Cashier.*"

Which being read and heard the said defendant, Andrew J. Whitnah, says *actio non*, because he says that at the time of the making of the said supposed bills of exchange the said defendants were copartners, under a special agreement or contract of partnership; that their said contract of partnership contained a stipulation regulating the borrowing of money, to the effect, to wit, that said defendants, Hiram A. Whitnah and Andrew J. Whitnah, should be consulted by said defendant, Humphrey Bell, in all loan matters before 53 firm name should be used when any considerable amount was borrowed, and that individual members of the said firm should sign for themselves for loans negotiated, and that there was no other stipulation in said agreement in this behalf.

This defendant further avers that the said supposed bills of exchange in the said declaration described at, to wit, the time and place in said declaration mentioned were executed, endorsed, and delivered by the said defendant, Humphrey Bell, to The First National Bank of Canton, Ill., a corporation created and existing under and by virtue of the laws of the United States, for money loaned to the defendant, Humphrey Bell, by the said The First National Bank of Canton, and for no other or different consideration whatever.

This defendant further aver that he did not sign the said supposed bills of exchange, but the same were signed by the said defendant, Humphrey Bell, in the name of their said copartnership, without the consent or knowledge of this defendant.

This defendant further avers that the said The First National Bank of Canton had full actual knowledge of the said copartnership contract and the terms thereof and the stipulation in regard to 54 borrowing money hereinbefore mentioned, and that said The First National Bank of Canton well knew and had full notice that the said supposed bills of exchange were executed and indorsed by the said Humphrey Bell for the purposes and in the manner aforesaid, without the consent or knowledge of this defendant, to wit, at the time and place of the delivery of the said supposed bills of exchange to it, the said The First National Bank of Canton.

And this defendant further avers that the said plaintiff is not the owner of the said supposed bills of exchange or either of them, but, on the contrary thereof, the said bills of exchange are the property of the said First National Bank of Canton.

And this the said defendant, Andrew J. Whitnah, is ready to verify. Wherefore he prays judgment, &c.

HOYNE, HORTON & HOYNE,
*Attorneys for Defendant, Andrew J. Whitnah.*

3. And for further plea to the said first, second, and third counts of the said plaintiff's said declaration said defendant, Andrew J. Whitnah, says *actio non*, because he says that at the time of the making of the said supposed bills of exchange the said defend- 55 ants were copartners under a special agreement or contract of partnership; that their said contract of partnership contained a stipulation regarding the borrowing of money, to the effect, to wit, that said defendant-, Hiram A. Whitnah and Andrew J.

Whitnah, should be consulted by said defendant, Humphrey Bell, on all loan matters before firm name should be used where any considerable amount was borrowed, and individual members of the said firm should sign for themselves for loans negotiated, and that there was no other stipulation in said agreement in this behalf.

This defendant further avers that the said supposed bills of exchange in the said declaration described at, to wit, the time and place in said declaration mentioned, were executed, endorsed, and delivered by the said defendant, Humphrey Bell, to the said First National Bank of Canton, a corporation created and existing under and by virtue of the laws of the United States, for money loaned by the said First National Bank of Canton to the said defendant, Humphrey Bell, and for no other or different consideration whatever.

This defendant further avers that he did not sign the said supposed bills of exchange, but the same were signed by the said defendant, Humphrey Bell, in the name of their said copartnership without the consent or knowledge of this defendant. 56

This defendant further avers that the said The First National Bank of Canton had full actual knowledge of the said copartnership contract and the terms thereof, and the stipulation in regard to borrowing money hereinbefore mentioned, and that the said First National Bank of Canton well knew and had full notice that the said supposed bills of exchange were executed and endorsed by the said Humphrey Bell, for the purposes and in the manner aforesaid, without the consent and knowledge of this defendant, to wit, at the time and place of the delivery of the said supposed bills of exchange to it, the said First National National Bank of Canton, of all which this defendant avers before and at the time of indorsement of the said supposed bills of exchange to the said plaintiff, as alleged in the said counts of the said declaration, the said plaintiff had notice, to wit, at the county aforesaid.

And this the said defendant Andrew J. Whitnah is ready to verify; wherefore he prays judgment, &c.

HOYNE, HORTON & HOYNE,
*Attorneys for Defendant, Andrew J. Whitnah.*

57 4. And for further plea to the said first, second, and third counts of the plaintiff's said declaration said Andrew J. Whitnah, defendant, says *actio non*, because he says that at the time of making the said supposed bills of exchange the said defendants were copartners under a special agreement or contract of partnership; that their said contract of partnership contained a stipulation regarding the borrowing of money, to the effect, to wit, that said defendants, Andrew J. Whitnah and Hiram A. Whitnah, should be consulted by said defendant, Humphrey Bell, on all loan matters before firm name should be used where any considerable amount was borrowed, and individual members of the said firm should sign for themselves for loans negotiated, and that there was no other stipulation in said agreement in that behalf.

This defendant further avers that the said supposed bills of exchange in the said declaration described at, to wit, the time and

place in said declaration mentioned, were executed, indorsed, and delivered by the said defendant, Humphrey Bell, to the First National Bank of Canton, a corporation created and existing under and by virtue of the laws of the United States, for money loaned to
the said defendant, Humphrey Bell, by the said The First
58 National Bank of Canton, and for no other or different consideration whatever.

This defendant further avers that he did not sign the said supposed bills of exchange, but the same were signed by the said defendant, Humphrey Bell, in the name of their said copartnership, without the consent or knowledge of this defendant.

This defendant further avers that the said The First National Bank of Canton had full, actual knowledge of the said copartnership contract and the terms thereof, and the stipulation in regard to borrowing money hereinbefore mentioned, and the said The First National Bank of Canton well knew and had full notice that the said supposed bills of exchange were executed and indorsed by said Humphey Bell, for the purpose and in the manner aforesaid, without the consent or knowledge of this defendant, to wit, at the time and place of the delivery of the said supposed bills of exchange to it, said The First National Bank of Canton.

And this defendant further avers that the said plaintiff is not a *bona fide* holder for value of the said bills of exchange, or either of them, but that, on the contrary thereof, the said plaintiff holds the
same for collection, and its possession and title are merely color-
59 able, and by arrangement with The Frst National Bank of
of Canton to prevent this defendant from setting up his defense.

And this the said defendant is ready to verify; wherefore he prays judgment, etc.

HOYNE, HORTON & HOYNE,
*Attorney for Defendant, Andrew J. Whitnah.*

5. And for a further plea to the said first, second, and third counts of the said plaintiff's said declaration, said defendant, Andrew J. Whitnah, says *actio non*, because he says before and at the time of making the said supposed bills of exchange the said defendants were copartners under a special contract or agreement of partnership, entered into on, to wit, the twenty-first day of November, A. D. 1877, at, to wit, the county aforesaid; that afterwards, on, to wit, the day and year last aforesaid, at, to wit, the place last aforesaid, the said defendants made certain arrangements with The First National Bank of Canton, a corporation created and existing under and by virtue of the laws of the United States, regarding advances of money to be made by said The First National Bank of Canton to
said defendants, to the effect, to wit, that in all cases of loans
60 or advances of money the said defendants should sign all
notes, drafts, or other obligations therefor individually, each for himself, and that in all foreign drafts accompanied by bill of lading of merchandise shipped, said The First National Bank of Canton should look for repayment to the avails of such shipments

and to the defendant, Humphrey Bell; and that this defendant, having no experience in or acquaintance with the business of shipments to foreign markets and drafts against the same, should not be liable upon any such drafts made by the said defendant, Humphrey Bell, in the name of their said copartnership.

This defendant further avers that he did not execute the said supposed bills of exchange, but that the same were executed and delivered by the said defendant, Humphrey Bell, in the name of their said copartnership, without the knowledge or consent of this defendant, and were accompanied by bills of lading for certain property shipped to foreign market, to wit, to Liverpool, England, such property being, to wit:

Three hundred and sixty (360) boxes of bacon, of great value, to wit, of the value of thirteen thousand dollars, and were drafts against shipments to foreign markets.

61 This defendant further avers that said The First National Bank of Canton had full knowledge of the character of said supposed bills of exchange and the purpose for which they were intended; and said defendant further avers that the bills of lading for the shipments aforesaid were attached to said drafts at the time of the delivery of said drafts to said The First National Bank of Canton by said defendant, Humprey Bell, to wit, at the place last aforesaid.

And this defendant avers that the said plaintiff is not the owner of the said supposed bills of exchange, or either of them, but, on the contrary thereof, the said supposed bills of exchange are the property of said The First National Bank of Canton.

And this the said defendant, Andrew J. Whitnah, is ready to verify; wherefore he prays judgment, etc.

HOYNE, HORTON & HOYNE,
*Attorneys for Defendant, Andrew J. Whitnah.*

6. And for further plea to the said first, second, and third counts of the said plaintiff's said declaration, said defendant, Andrew J. Whitnah, says *actio non*, because he says that before and at the time of the making of the said supposed bills of exchange the said defendants were copartners under a special contract or agreement of 62 partnership entered into on, to wit, the twenty-first day of November, A. D. 1877, at, to wit, the county aforesaid; that afterwards and on, to wit, the day and year last aforesaid, at, to wit, the place last aforesaid, the said defendants made certain arrangements with the First National Bank of Canton, a corporation created and existing under and by virtue of the laws of the United States, regarding advances of money to be made by the said The First National Bank of Canton to said defendants, to the effect, to wit, that in all cases of loans or advances of money the said defendants should sign all notes, drafts, or other obligations therefor individually, each for himself, and that in all foreign drafts accompanied by bills of lading for merchandise shipped said The First National Bank of Canton should look for repayment to the avails of such shipments and to the defendant, Humphrey Bell; and that this de-

fendant, having no experience in or acquaintance with the business of shipping merchandise to foreign markets and drawing drafts against the same, should not be liable upon any such drafts made by the said defendant, Humphrey Bell, in the name of their copartnership.

63 This defendant further avers that he did not execute the said supposed bills of exchange, but that the same were executed and delivered by the said defendant Humphrey Bell in the name of their said copartnership without the knowledge or consent of this defendant, and were accompanied by bills of lading for certain property shipped to foreign market, to wit, to Liverpool, England, such property being, to wit: Three hundred and sixty (360) boxes of bacon of great value, to wit, of the value of thirteen thousand dollars, and were drafts against shipments to foreign markets.

This defendant further avers that said The First National Bank of Canton had full knowledge of the character of said supposed bills of exchange and the purpose for which they were intended; and said defendant further avers that the bills of lading for the shipments aforesaid were attached to said supposed bills of exchange, and were delivered with said supposed bills of exchange at the time of the delivery thereof to the said The First National Bank of Canton by said defendant Humphrey Bell, to wit, at the place last aforesaid, of all which this defendant avers, before and at the time of the indorsement of the said supposed bills of exchange to the said plaintiff, as alleged in the said counts of the said declaration, the said plaintiff had notice, to wit, at the county aforesaid.

64 And this the said defendant, Andrew J. Whitnah, is ready to verify; wherefore he prays judgment, etc.

HOYNE, HORTON & HOYNE,
*Attorneys for Defendant, Andrew J. Whitnah.*

UNITED STATES OF AMERICA,
*Northern District of Illinois,* } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois. To the May Term, A. D. 1879.

HUMPHREY BELL, impleaded with HIRAM A. WHITNAH
and ANDREW J. WHITNAH,
*ads.*
THE FIRST NATIONAL BANK OF CHICAGO. } Assumpsit.

And for further plea in this behalf the said defendant, Humphrey Bell, impleaded with said Hiram A. Whitnah and Andrew J. Whitnah, for himself says *actio non*, because he says that he, together with the said Hiram A. Whitnah and Andrew J. Whitnah, did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him; and of this the said defendant, the said Humphrey Bell, puts himself upon the country, etc.

65 HOYNE, HORTON & HOYNE,
*Attorneys for Defendant, Humphrey Bell.*

(Endorsed:) Filed May 14, 1879. W. H. Bradley, clerk.

Afterwards, to wit, on the 21st day of May, A. D. 1879, came the plaintiff, by its attorneys, and filed in said clerk's office its replication to the pleas of the said defendants in said entitled cause, which said replication is in the words and figures following, to wit:

66 *Replication.*

UNITED STATES OF AMERICA,
*Northern District of Illinois,* } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois. Of the May Term, A. D. 1879.

THE FIRST NATIONAL BANK OF CHICAGO
*vs.*
HUMPHREY BELL, HIRAM A. WHITNAH, and ANDREW J. WHITNAH, Copartners under the firm name and style of Humphrey Bell & Co. } Assumpsit.

And the said plaintiff, as to the plea of Humphrey Bell, by him pleaded, wherein said defendant hath put himself upon the country, doth the like.

By HITCHCOCK, DUPEE & JUDAH,
*Its Att'ys.*

67 UNITED STATES OF AMERICA,
*Northern District of Illinois,* } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois. Of the May Term, A. D. 1879.

THE FIRST NATIONAL BANK OF CHICAGO
*vs.*
HUMPHREY BELL, HIRAM A. WHITNAH, and ANDREW J. WHITNAH, Copartners under the firm name and style of Humphrey Bell & Co. } Assumpsit.

And said plaintiff, as to the pleas of the said defendants by them above pleaded, says: That it, said plaintiff, by reason of anything in those pleas alleged, ought not to be barred from having and maintaining its aforesaid action, because it says that said defendants, at the time when, &c., of their own wrong, and without the causes in their said pleas alleged, committed the wrongs and injuries attempted in said pleas to be justified, in manner and form as said plaintiff hath in its said declaration complained against the said defendants.

And this said plaintiff prays may be enquired of by the country, &c.

By HITCHCOCK, DUPEE & JUDAH,
*Its Att'ys.*

68 UNITED STATES OF AMERICA,
*Northern District of Illinois,* } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois. Of the May Term, A. D. 1879.

THE FIRST NATIONAL BANK OF CHICAGO
*vs.*
HUMPHREY BELL, HIRAM A. WHITNAH, and ANDREW J. WHITNAH, Copartners under the firm name and style of Humphrey Bell & Co. } Assumpsit.

And the said plaintiff, as to the plea of said defendant, Hiram A. Whitnah, by him pleaded, wherein said defendant hath put himself upon the country, doth the like.

By HITCHCOCK, DUPEE & JUDAH,
*Its Att'ys.*

And said plaintiff, as to the other pleas of said defendant, Hiram A. Whitnah, by him above pleaded, says that it, said plaintiff, by reason of anything in those pleas alleged, ought not to be barred from having and maintaining its aforesaid action, because it says that said defendant, at the time when, &c., of his own wrong, and without the causes in said pleas alleged, committed the wrongs and injuries attempted in said pleas to be justified in manner and form as said plaintiff had in its said declaration complained against the said defendant.

And this said plaintiff prays may be enquired of by the country.

By HITCHCOCK, DUPEE & JUDAH,
*Its Att'ys.*

69 UNITED STATES OF AMERICA,
*Northern District of Illinois,* } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois. Of the May Term, A. D. 1879.

THE FIRST NATIONAL BANK OF CHICAGO
*vs.*
HUMPHREY BELL, HIRAM A. WHITNAH, and ANDREW J. WHITNAH, Copartners under the firm name and style of Humphrey Bell & Co. } Assumpsit.

And the said plaintiff, as to the plea of said defendant, Andrew J. Whitnah, by him above pleaded, wherein said defendant hath put himself upon the country, doth the like.

By HITCHCOCK, DUPEE & JUDAH,
*Its Att'ys.*

And said plaintiff, as to the other pleas of said defendant, Andrew J. Whitnah, by him above pleaded, says that it, said plaintiff, by reason of anything in those pleas alleged, ought not to be barred from having and maintaining its aforesaid action, because it says that said defendant, at the time when, &c., of his own wrong, 70 and without the causes in said pleas alleged, committed the wrongs and injuries attempted in said pleas, to be justified in manner and form as said plaintiff hath in its said declaration complained against the said defendant.

And this said plaintiff prays may be enquired of by the country, &c.

By HITCHCOCK, DUPEE & JUDAH,
*Its Att'ys.*

Endorsed: Filed May 21, 1879. W. H. Bradley, cl'k.

71 Afterwards, to wit, on the nineteenth day of February, A. D. 1880, in the December term, 1879, of said court, in the record of the proceedings thereof in said entitled cause before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

*Order.*

THE FIRST NATIONAL BANK OF CHICAGO
*vs.*
HUMPHREY BELL *et al.*
} Assumpsit.

Now come the parties, by their attorneys, and upon issue joined thereupon come a jury of good and lawful men, to wit, William Halley, J. C. Persels, Nathaniel Vose, John J. O'Reilly, D. C. Skelly, N. J. Adams, William Knapp, John Swansey, John S. Ashby, Stephen Lasher, William A. Phelps, and George W. Hotaling, who were all duly elected, tried, and sworn well and truly to try said issue, and after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

72 Afterwards, to wit, on the twentieth day of February, A. D. 1880, in the December term, A. D. 1879, of said court, in the record of the proceedings thereof in said entitled cause before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

*Order.*

THE FIRST NATIONAL BANK OF CHICAGO
*vs.*
HUMPHREY BELL *et al.*
} Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empanelled and sworn, and after hearing the concluding evidence and a part of the arguments of counsel, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

Afterwards, to wit, on the twenty-first day of February, A. D. 1880, in the December term, A. D. 1879, of said court, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

*Order.*

THE FIRST NATIONAL BANK OF CHICAGO
*vs.*
73 HUMPHREY BELL *et al.* } Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing the concluding arguments of counsel and receiving the instructions of the court, the jury retired to consider of their verdict, and by agreement of the parties, by their attorneys, the jury, when they shall have agreed upon a verdict, may sign and seal the same and deliver it to the clerk, and disperse.

On the same day, to wit, on the twenty-first day of February, A. D. 1880, in the December term, A. D. 1879, of said court, in the record of the proceedings thereof in said entitled cause before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

*Order.*

74 THE FIRST NATIONAL BANK OF CHICAGO
*vs.*
HUMPHREY BELL *et al.* } Assumpsit.

The jury in this behalf, empaneled and sworn, having failed to agree upon a verdict herein at a late hour this evening, was, by direction of the court, discharged from the further consideration of the cause.

Afterwards, to wit, on the fifteenth day of February, A. D. 1881, in the December term, A. D. 1880, of said court, in the record of the proceedings thereof in said entitled cause before Hon. Thomas Drummond, circuit judge, is the following entry, to wit:

*Order.*

THE FIRST NATIONAL BANK OF CHICAGO
*vs.*
HUMPHREY BELL *et al.* } Assumpsit.

Now come the parties, by their attorneys, and upon issue joined thereupon come a jury of good and lawful men, to wit, S. D. Handy,
Charles F. Witt, H. L. Bush, O. A. Alford, Theodore Perry,
75 Jacob A. Wood, H. B. Brown, George W. Silver, A. J. Story,
A. C. Thompson, L. M. Hollister, and Benjamin Plummer,
who were all duly elected, tried, and sworn well and truly to try said issue, and on motion of the plaintiff, by its attorney, leave is given it to amend the *præcipe*, summons, and declarations herein, by making the *ad damnum* fifteen thousand dollars, and after hearing a part of the evidence, the hour of adjournment having arrived, it is ordered that the further trial be postponed until to-morrow morning.

Afterwards, to wit, on the sixteenth day of February, A. D. 1881, in the December term, A. D. 1880, of said court, in the record of the proceedings thereof in said entitled cause before Hon. Thomas Drummond, circuit judge, is the following entry, to wit:

*Order.*

THE FIRST NATIONAL BANK OF CHICAGO }
*vs.* } Assumpsit.
HUMPHREY BELL *et al.* }

Now come again the parties, by their attorneys, and come also the jury in this behalf empaneled and sworn, and after hearing the concluding evidence and a part of the arguments of counsel,
76 the hour of adjournment having arrived, it is ordered that the further trial be postponed until to-morrow morning.

Afterwards, to wit, on the 17th day of February, A. D. 1881, in the December term, A. D. 1880, of said court, in the record of the proceedings in said entitled cause before Hon. Thomas Drummond, circuit judge, is the following entry, to wit:

*Order.*

THE FIRST NATIONAL BANK OF CHICAGO }
*vs.* } Assumpsit.
HUMPHREY BELL *et al.* }

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing the concluding arguments of counsel, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

Afterwards, to wit, on the eighteenth day of February, A. D. 1881, in the December term, A. D. 1880, of said court, in the record of the proceedings thereof in said entitled cause before Hon. Thomas
77 Drummond, circuit judge, is the following entry, to wit:

*Order.*

THE FIRST NATIONAL BANK OF CHICAGO }
*vs.* } Assumpsit.
HUMPHREY BELL *et al.* }

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after receiving the instructions of the court, the jury retired to consider of their verdict, and after a short absence the jury returned into court the following verdict, to wit:

We, the jury, find the issue for the defendants, and assess their damages to the sum of three hundred and eighty-six dollars and seventeen cents.

And thereupon the plaintiff, by its attorney, moves the court for a new trial herein.

78 Afterwards, to wit, on the fourth day of March, A. D. 1881, came the plaintiff, by its attorneys, and filed in said clerk's office its motion for a new trial in said entitled cause, which said motion for a new trial is in the words and figures following, to wit:

*Motion for New Trial*

UNITED STATES OF AMERICA, } ss:
*Northern District of Illinois,*

In the United States Circuit Court for the Northern District of Illinois.

FIRST NATIONAL BANK OF CHICAGO *vs.* HUMPHREY BELL *et al.*

And now comes the plaintiff, by Hitchcock, Dupee & Judah, its attorneys, and moves the court to set aside the verdict rendered and to grant a new trial in this cause, and for grounds of its motion the plaintiff shows to the court the following, to wit:

1. The court improperly gave to the jury the instructions and each of them asked by the defendants.

2. The court improperly refused to give to the jury instructions asked by the plaintiff.

79 3. The verdict is contrary to the law and the evidence in the case.

4. And the plaintiff assigns as a further reason for granting a new trial that it asked the court to instruct the jury as to the legal effect of the telegram sent from Mr. Heald, cashier of The First National Bank of Canton, to The First National Bank of Chicago, so far, as it related to the control over or personal custody of the meats. The dispatch referred to was in the following words: "Request Alfred Jacks to sell meats for benefit of drafts." The plaintiff asked the court to give construction to this language. The court declined or failed to state its construction of this language, but used language calculated to mislead the jury and leave them to interpret the language, and to determine its legal effect for themselves.

5. The plaintiff further assigns as a reason for granting a new trial that the court was asked to instruct the jury that the dispatch, before stated, sent by Mr. Heald to The First National Bank of Chicago, imposed no obligation upon The First National Band of Chicago to comply with it, if The First National Bank of Chicago should see fit to exercise the authority conferred by the letters of hypothecation.

6. And for a further reason for granting a new trial the 80 plaintiff assigns that the court did not instruct the jury, in accordance with the request of the plaintiff, as to whose agent Jacks was, under the evidence in the case, but left the jury to infer, from remarks made by the court calculated to mislead them, that he was the agent of the plaintiff in the sale or disposition of the goods.

7. There was no evidence in the case tending to show that Jacks was the agent of the plaintiff in disposing of the meats.

8. And for a further reason for granting a new trial the plaintiff

says that it asked the court to charge the jury as to the legal effect of the letters of hypothecation with reference to the control or the custody of the goods, and the court declined to instruct the jury, except as in the language of the charge.

HITCHCOCK, DUPEE & JUDAH,
*Pl'tffs Att'ys.*

(Endorsed:) Filed M'ch 4, 1881. W. H. Bradley, cl'k.

81 Afterwards, to wit, on the thirtieth day of April, in the adjourned March term, A. D. 1881, of said court, in the record of the proceedings thereof in said entitled cause before Hon. Thomas Drummond, circuit judge, is the following entry, to wit:

*Order.*

THE FIRST NATIONAL BANK OF CHICAGO
*vs.*
HUMPHREY BELL *et al.*
} Assumpsit.

A motion for a new trial having been heretofore entered herein by the plaintiff, and argued by the counsel of the respective parties in this case and considered by the court, it is ordered that the said motion be sustained and a new trial granted herein.

Afterwards, to wit, on the first day of March, A. D. 1882, in the December term, A. D. 1881, of said court, in the record of the proceedings thereof in said entitled cause before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

*Order.*

THE FIRST NATIONAL BANK OF CHICAGO
*vs.*
HUMPHREY BELL *et al.*
} Assumpsit.

82 Now come the parties by their attorneys and upon issue joined thereupon comes a jury of good and lawful men, to wit, Ed. A. Worrell, Bernard Glavey, Edgar Sanders, Daniel J. Pinckney, Daniel Butler, Milliken Clark, William R. Buser, Isaac L. Milliken, L. D. Kelley, Victor Fredenhagen, Alfred Strong, and Samuel Jordan, who were all duly elected, tried, and sworn, well and truly to try said issue, and after hearing a part of the evidence, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

Afterwards, to wit, on the second day of March, A. D. 1882, in the December term, A. D. 1881 of said court, in the record of the proceedings thereof in said entitled cause before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

*Order.*

The First National Bank of Chicago } Assumpsit.
*vs.*
Humphrey Bell *et al.*

Now come again the parties by their attorneys, and now
83 come also the jury in this behalf empaneled and sworn, and
after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

Afterwards, to wit, on the third day of March, A. D. 1882, in the December term, A. D. 1881, of said court, in the record of the proceedings thereof in said entitled cause before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

*Order.*

The First National Bank of Chicago } Assumpsit.
*vs.*
Humphrey Bell *et al.*

Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing the concluding evidence and a part of the arguments of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

84 Afterwards, to wit, on the fourth day of March, A. D. 1882,
in the December term, A. D. 1881, of said court, in the record and proceedings thereof in said entitled cause before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

*Order.*

The First National Bank of Chicago } Assumpsit.
*vs.*
Humphrey Bell *et al.*

Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing additional arguments without concluding the same, it is ordered that the further trial of the cause be postponed. until Monday morning next.

Afterwards, to wit, on the sixth day of March, in the adjourned March term, A. D. 1882, of said court, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

### *Order.*

85 THE FIRST NATIONAL BANK OF CHICAGO
*vs.*
HUMPHREY BELL, HIRAM A. WHITNAH, and ANDREW J. WHITNAH. } Assumpsit.

Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing the concluding arguments of counsel, the court directs the jury to return a verdict for the plaintiff for the amount of the plaintiff's claim, and thereupon the jury return the following verdict, to wit:

We, the jury, find the issue for the plaintiff, and assess its damages at ten thousand nine hundred and thirty-seven dollars and thirteen cents. And thereupon the defendants, by their attorneys, move the court for a new trial herein.

(For exception to above order, see page 191.)

86 Afterwards, to wit, on the twenty-fourth day of March, A. D. 1882, came the defendants, by their attorneys, and filed in said clerk's office their motion for a new trial in said entitled cause, which said motion is in the words and figures following, to wit:

### *Motion for New Trial.*

In the Circuit Court of the United States for the Northern District of Illinois, at the March Term, A. D. 1882.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

FIRST NATIONAL BANK OF CHICAGO
*vs.*
HUMPHREY BELL, ANDREW J. WHITNAH and HIRAM A. WHITNAH, Copartners as Humphrey Bell and Company. } Ass't.

And now come the said defendants, by Hoyne, Horton and Hoyne, their attorneys, and move the court to set aside the finding in said cause and for a new trial, because—

1st. The court admitted improper evidence in behalf of the said plaintiff against the objections of the defendants.

2nd. The court excluded proper evidence offered in behalf of the said defendants.

3rd. The court erred in entering the finding as the verdict or finding of the jury.

87 4th. The court erred in allowing to the plaintiff the ten per cent. statutory damages upon foreign bills of exchange, as claimed by the plaintiff.

5th. The court erred in taking the cause from the jury and deciding the same without submitting the same to the jury.

6th. The court erred in not submitting to the jury the contested questions of fact in said cause, and in refusing to allow the jury to find a verdict.

7th. The finding is contrary to the law and the evidence of the case.

8th. The court erred in refusing the prayers of the defendants for instructions and each and every such prayer, the said prayers being as follows, to wit:

1st. That if they believe, from the evidence, and under the instructions of the court, that if the First National Bank of Canton, Illinois, would not be entitled to recover a judgment against the defendants, A. J. Whitnah and H. A. Whitnah, if it were plaintiff in this case, that then your verdict in this case should be in favor of said defendants, A. J. and H. A. Whitnah.

2nd. That if they believe, from the evidence, that by reason of the fault, neglect, and omissions of the City Bank of London or the First National Bank of Chicago, the meats described in the bills of lading accompanying the drafts sued on, or any part thereof, or the proceeds of sales of such meats, or any part thereof, was lost 88 to the defendants in this case on account of such fault, neglect, or omission, that then the value of the meats so lost, or the amount of such proceeds so lost, or both, as the case may be, must be allowed to the defendants, and deducted from the amount of said drafts.

Third. That if they believe, from the evidence, that any sums have been paid or received on account of said drafts by either of said banks, that the amount thereof must be allowed and deducted from the amount of said drafts.

Fourth. That if they believe, from the evidence, and under the instructions of the court, that any sums paid or received on account of said drafts as aforesaid, if any, together with the amount, if any, lost to said defendants, of said meats or proceeds thereof, in the manner or for the reason aforesaid, amount to more than the amount due upon said drafts, then, under the pleadings in this case, your verdict will be in favor of defendants and against the plaintiff for such excess.

Fifth. That if they believe, from the evidence, that the plaintiff holds the bills of exchange sued on in this case only under and by virtue of the endorsement thereon by the cashier of the First National Bank of Canton by C. T. Heald, cashier, and that the terms and provisions of such endorsement were not changed or varied by the papers accompanying or the letters transmitting said bills 89 of exchange from said Canton bank to said plaintiff, nor by other facts pertaining to the payment of money, and also that there has been no subsequent agreement between the parties to this case changing such endorsement, that then any defence which could be legally made by the defendants, the Messers. Whitnah, if the said Canton bank was plaintiff in this suit, may be made against the claim of the plaintiff in this suit, The First National Bank of Chicago.

Sixth. That the bills of exchange sued on in this case are what are known to the law as foreign bills; that upon such bills three days, called days of grace, are allowed by law after the day on which they become due or mature; that such a "bill does not become due, in fact or in law, on the day mentioned on its face, but on the last day of grace;" 1 Peters, 31; that unless such bills are duly protested on the last day of grace (or on the second day, if the last day be Sunday), such protest is not duly made, and the drawers and endorsers are thereby discharged from liability upon such bills."

Seventh. That if the jury believe, from the evidence, and under the instructions of the court, that the bills of exchange sued upon in this case were not protested upon the last day of grace (or upon the preceding day, if the last day fell on a Sunday), then the verdict of the jury must be for the defendants.

90 Eighth. That brokers are "those who are engaged for others in the negotiation of contracts relative to property with the custody of which they have no concern." Provision brokers, or merchandise brokers, are "those who negotiate the sale of merchandise (or provisions) without having possession or control of it as factors have."

If, therefore, the jury believe, from the evidence, and under the instructions of the court, that the plaintiff or the City Bank of London was authorized or instructed by the defendants to employ Alfred Jacks as broker only, and that without the authority or instructions of defendants said plaintiff or said City Bank of London turned over the meats in question and the control and possession thereof to said Jacks, with the power and authority to sell the same, and to collect and receive the proceeds of such sales for account of said City Bank of London, and that there was any loss thereby which could not or would not have occurred if said Jacks had been employed as a broker only, then such loss is not the loss of defendants in this case; and the jury in determining upon their verdict will allow the defendants the amount of such loss, if any, as they believe from the evidence was thus sustained.

91 Ninth. If the jury believe, from the evidence, that the plaintiff or the City Bank of London violated instructions of the defendants or either of them as to the control, custody, and sale of the meats in question, and that thereby a loss was incurred, that then the defendants should be allowed the amount which the evidence shows such loss to have been.

Tenth. That if they believe, from the evidence, and under the instructions of the court, that the First National Bank of Canton, Illinois, would not be entitled to recover a judgment against the defendants if it were plaintiff in this case, that then their verdict in this case will be for the defendants.

Eleventh. That under the pleadings and proof in this case the jury cannot allow the ten per cent. statutory damages claimed by the plaintiff.

9th. The court erred in deciding that there were no questions of fact in said cause, and erred in refusing to submit to the jury the following questions of fact, among others, to wit:

1st. Whether or not the transfer of the drafts sued upon in said cause was for discount or sale or for collection.

2d. Whether the City Bank of London was the agent of the plaintiff or of the defendants in the disposal of the property pledged. 92

3d. Whether the property pledged was held and disposed of by the City Bank of London under the hypothecation paper or under the instructions in the telegrams and cablegrams and letters.

4th. Whether or not there was intended by the defendants to be any change in the agency by the cablegram, telegrams, and letters which was understood by the plaintiff and the City Bank of London.

5th. Whether or not the City Bank of London and the plaintiff waived the authority in the hypothecation papers by asking for instructions from the defendants.

6th. Whether or not the instructions sent by the defendants were understood by the plaintiff and the City Bank of London as a change of the original authority contained in the hypothecation papers.

7th. Whether or not under the hypothecation papers there was any right in the City Bank of London to deliver up the property.

8th. Whether or not there was such gross negligence as to release said defendants.

9th. Whether or not from the testimony it would appear that after the instructions called for by the plaintiff the plaintiff assumed control of the property, and by such assumption 93 charged itself with the duty of seeing to the disposition of the property.

10th. Whether or not the plaintiff converted the property to its own use.

11th. Whether or not the plaintiff placed the property beyond the control of the defendants.

12th. Whether or not the defendants, Andrew J. Whitnah and Hiram A. Whitnah, were guaranteed against loss by the First National Bank of Canton, or Charles T. Heald, its cashier.

13th. Whether or not there was neglect in leaving the proceeds of the property in the hands of the broker for a period of several months without investigation or effort to obtain the same by the City Bank of London.

14th. Whether or not the money arising from the disposal of the property was not received by the City Bank of London on behalf of the plaintiff.

15th. Whether or not the drafts sued on were paid.

10th. The court erred in deciding that the City Bank of London was the agent of the defendants.

11th. The court erred in deciding that the bills of exchange sued upon were properly protested.

12th. The court erred in not submitting to the jury the question of fact whether or not days of grace had been allowed 94 on said bills of exchange before the protest thereof.

HOYNE, HORTON & HOYNE,
*Defendants' Attorneys.*

(Endorsed:) Filed March 24, 1882. Wm. H. Bradley, clerk.

95 Afterwards, to wit, on the fifth day of April, in the adjourned March term, A. D. 1882, of said court, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

### *Order.*

THE FIRST NATIONAL BANK OF CHICAGO
*vs.*
HUMPHREY BELL, HIRAM A. WHITNAH, and ANDREW J. WHITNAH. } Assumpsit.

Now come the parties, by their attorneys, and the court having considered, and being now fully advised, upon the motion of the defendants, heretofore entered herein, for a new trial of this cause, overrules the same and awards judgment.

It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendants the said sum of ten thousand nine hundred and thirty-seven dollars and thirteen cents, its damages so as aforesaid assessed, together with its costs and charges in this behalf expended, amounting to forty-three dollars and five cents, and that it have execution therefor.

96 Afterwards, to wit, on the twenty-eighth day of April, A. D. 1882, there was filed in said clerk's office a supersedeas bond in said entitled cause, which said supersedeas bond is in the words and figures following, to wit·

### *Supersedeas Bond.*

Know all men by these presents, that we, Humphrey Bell, Andrew J. Whitnah, and Hiram A. Whitnah, of the county of Fulton, in the State of Illinois, as principals, and John Fisher and Charles H. Martin, as sureties, of the county of Fulton, in said State of Illinois, are held and firmly bound unto The First National Bank of Chicago, a corporation created and existing under and by virtue of the laws of the United States, its successors and assigns, in the sum of fifteen thousand dollars, lawful money of the United States; for the payment of which, well and truly to be made to the said First National Bank of Chicago, its successors and assigns, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly by these presents.

Witness our hands and seals, this twenty-sixth day of April, A. D. 1882.

97 The condition of the above obligation is such that, whereas the said First National Bank of Chicago did, on the fifth day April, A. D. 1882, in the circuit court of the United States for the northern district of Illinois, and of the March term thereof, A. D. 1882, recover a judgment against the above-bounden Humphrey Bell, Andrew J. Whitnah, and Hiram A. Whitnah for the sum of ten thousand nine hundred and thirty-seven dollars and thirteen cents, besides costs of suit; and whereas the above-bounden Humphrey Bell, Andrew J. Whitnah, and Hiram A. Whitnah have prosecuted a writ of error to the Supreme Court of the United States to reverse the above-mentioned judgment rendered by the said circuit court of the United States:

Now, therefore, if the said Humphrey Bell, Andrew J. Whitnah, and Hiram A. Whitnah shall duly prosecute their said writ of error with effect, and shall answer all costs and damages, if they shall fail to make their said plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

HUMPHREY BELL. [SEAL.]
ANDREW J. WHITNAH. [SEAL.]
HIRAM A. WHITNAH. [SEAL.]
JOHN FISHER. [SEAL.]
CHARLES H. MARTIN. [SEAL.]

Approved, and writ of error made supersedeas.

H. W. BLODGETT, *Judge.*

98 STATE OF ILLINOIS,
*County of Fulton,* } *ss:*

John Fisher and Charles H. Martin, being first duly sworn, depose and say that they are the sureties named in the foregoing bond; and the said John Fisher doth depose and say that he is a resident of the State of Illinois and a property holder therein; that he is worth in unincumbered real estate more than the sum of ten thousand dollars over and above all his debts and liabilities, and exclusive of property by law exempt from execution, and that he has property in the State of Illinois liable to execution of the value of more than ten thousand dollars; and the said Charles H. Martin doth depose and say that he is a resident of the State of Illinois and a property holder therein; that he is worth in unincumbered real estate more than the sum of ten thousand dollars over and above all his debts and liabilities, and exclusive of property by law exempt from execution, and that he has property in the State of Illinois liable to execution of the value of more than ten thousand dollars.

JOHN FISHER.
CHARLES H. MARTIN.

Subscribed and sworn to before me by the said John Fisher and Charles H. Martin, this 25th day of April, A. D. 1882.

99 [SEAL.] C. D. HOBLITT,
*Notary Public.*

(Endorsed:) Filed April 28, 1882. Wm. H. Bradley, clerk.

100 *Bill of Exceptions.*

UNITED STATES OF AMERICA,
*Northern District of Illinois,* } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois.

FIRST NATIONAL BANK OF CHICAGO
*vs.*
HUMPHREY BELL, ANDREW J. WHITNAH, and HIRAM WHITNAH. } 15956.

Be it remembered that on the trial of the above-entitled cause, at the December term, A. D. 1881, of said circuit court, the plaintiff, to maintain the issue on its part, gave in evidence to the jury testimony as follows:

CHARLES T. HEALD testified:

Was cashier of the First National Bank of Canton nearly eighteen years, and up to January, 1882, defendants composed the firm of Humphrey Bell & Co., and were engaged in 1878 in packing pork at Canton, Illinois, about 200 miles from Chicago, for the English market.

That the signatures to the three drafts sued on in this case are in the handwriting of Humphrey Bell, as are also the endorsement of the name of Humphrey Bell and Co. on the back of the drafts.

101 Two of the drafts are dated March 4th, and one March 11th. Mr. Bell delivered these drafts to me the day of the date or the day after they bear date, to negotiate for his firm.

I, as cashier, had general instructions from him, received in the fall of 1877, to send their bills to plaintiff for sale. He said he had some arrangement with the plaintiff to have said drafts sent directly there for sale. On receiving returns from these drafts from plaintiff the current market value thereof was credited to Humphrey Bell & Co. in the books of the First National Bank of Canton, and was checked out by them in payment for pork product.

Q. When you sent these drafts to plaintiffs was the special endorsement over the signature of Humphrey Bell & Co. then written thereon?

To which question counsel for defendants objected, which objection was overruled by the court; to which ruling defendants then and there duly excepted.

Witness answers that it was not. The endorsement by Humphrey Bell & Co. was in blanks, and the special endorsement written over this firm name was placed there aftewards, when and by whom I don't know. The endorsement upon each of these drafts, in the words "Pay First National Bank of Chicago, or order, for collection account of First National Bank of Canton, Illinois, C. F. Heald, cashier," was upon the drafts when I forwarded them to the plaintiff. It is printed on by rubber stamp, except the word "First," which is written.

My bank had at that time several rubber stamps, containing other language than this.

102 This question was then asked by plaintiff's attorney:

Q. I will ask you whether those three drafts were, in point of fact, sent by your bank to the First National Bank of Chicago for collection on account of the First National Bank of Canton?

Objected to by defendants' attorney, which objection was overruled by the court; to which ruling defendant then and there duly excepted, defendant's attorney at the time stating to the court, in substance, and in support of this objection, that all communication between the plaintiff and the First National Bank of Canton pertaining to these drafts was by correspondence, and is in writing.

To which the witness answers:

A. I don't understand that they were sent for collection for credit, as the endorsement would imply.

By plaintiff's attorney:

Q. Do you know the fact whether it was sent for collection or not?

To which question defendants objected. Objection overruled, and exception duly taken.

I sent them to the bank for sale for Humphrey Bell & Co.

Witness further states he had no correspondence or conversation with the plaintiff, except the letter in which the drafts were forwarded to plaintiff, nor any arrangement with plaintiff about
103 these drafts, except as I sent them forward by letter. Proceeds of drafts received by me, and passed to the credit of defendants within two days after drafts were forwarded.

Two of the drafts, amounting to £1,650, were sent March 4th, and one for £800, March 11th.

Said letters of March 4th and 11th from witness, as cashier of the Canton bank, to the plaintiff read in evidence, stating that he enclosed for collection and credit said drafts, describing them, the words "for collection and credit" being printed in the letter form.

By plaintiff's attorney:

Q. Now, you stated yesterday that these drafts were sent to the First National Bank of Chicago for sale. I will ask to explain why, in these endorsements and in those letters, the words "for collection and credit" are used?

Which question was objected to by defendants.

Objection overruled by the court, and exception duly entered by defendants.

Witness: A. In some of the letters enclosing the first drafts sent to plaintiff "collection" and "credit" were stricken out entirely and "sale" inserted in place of it afterwards, with the understanding that all was understood by the banks.

There was some carelessness in striking it out, and the printed form of letter was used without going into the details and striking out the words "collection" and "credit" and inserting "sale."
104 The same in regard to the endorsements upon the backs of the drafts.

It was simply for convenience; perhaps carelessly used.

To which answer defendants then and there objected, and moved that the same be stricken out; which objection and motion were overruled by the court; to which ruling of the courts defendants duly excepted.

Witness: No different arrangement had been made with reference to these drafts after sending forward the others spoken of.

Witness received notice of protest of the first two drafts May 24, 1878, by letter from plaintiff dated May 23rd.

This letter read in evidence, which states in substance that plaintiff was advised by cable of that date that the first two drafts had gone to protest for non-payment, and stating: "Be kind enough to advise me by wire what disposition shall be made of the property. I charge your account for cablegram $4.25, which please return."

WITNESS continues: I at once communicated the facts of the protest to defendant Bell; showed him the letter. June 6, 1878, I received letter dated June 4, from plaintiff, advising me of non-payment of the third draft.

Said letter from plaintiff read in evidence to the jury, which says, after stating the fact of the protest for non-payment: "You
105 will please instruct in reference to it." This letter encloses forms of protest of two former drafts, and adds, that we charge for costs of protest $5.16, and for costs and cablegram $4.30.

WITNESS continues: I do not know personally whether defendant Bell saw this letter.

He afterwards admitted to me that he saw the protest papers which came in it.

Witness identified certificates of protest, and stated that he showed them to Mr. Bell about the time they were received by him. Mr. Bell was the financial manager of the defendant firm from December, 1877, to April, '78.

Plaintiff then offered in evidence the three drafts sued upon, and the papers identified by witness as certificates of protest.

To the admission of these papers, and each and every one of them, defendants then and there objected; which objection was overruled by the court, and said papers read in evidence to the jury; to the verruling of which objection and the reading of said papers to the ury counsel for the defendants then and there duly excepted.

The first of said drafts, with endorsements thereon, is as follows:

£850. CANTON, ILL., *March 4th*, 1878.

Sixty days after sight of this first of exchange (the second and third unpaid) pay to the order of ourselves, in London, eight
106 hundred and fifty pounds sterling, value received, and charge to the account of

HUMPHREY BELL & CO.

To W. D. TURNER, Jun., Liverpool.

Written across the face of the draft are the following words:

"Accepted, payable at Messrs. Barclay & Co., bankers, London, due 21 May.

"W. D. TURNER, JUN."

Endorsed upon the backs of said drafts is the following:

"Pay to the order of the First National Bank of Canton, Ill.

"HUMPHREY BELL & Co."

Also:

"Pay First National Bank, Chicago, or order, for collection account of First National Bank of Canton, Ill.

"C. T. HEALD, *Cashier*."

This endorsement is put on with rubber stamp, except the word "First," which is written.

Also:

"Pay to the order of the City Bank of London, for account of First National Bank, Chicago.

"H. —. SYMONDS, *C.*"

Also, several endorsements of payments on account of this draft.

107 The other two drafts in question are for £800 each, and are in the same form, one being dated March 4th and one March 11th, and accepted in the same words, except that on the one dated March 11th it is stated "due 31st May," and the endorsements on each are the same, except a slight difference in the amounts paid thereon.

The three drafts are numbered on their face by the plaintiff, respectively, Nos. 7983, 7984, & 8107.

The paper introduced and read in evidence as the certificate of protest of said £850 draft states that on the 21st day of May, 1878, at the request of the City Bank of London, the notary public exhibited the original bill of exchange, before copied, to a clerk in the banking-house of Messrs. Barclay and Company, bankers, London, where the said bill is accepted payable, and demanded payment of its contents, which demand was not complied with, but the said clerk thereunto answered, "No orders."

Whereupon the said notary protested the said draft against the drawers, acceptor, and endorsers.

The other two papers introduced as certificates of protest of the other two of said drafts are in the same form, and states the protest to be in each case the same day they are stated to be due in the acceptance thereof.

108 Upon the cross-examination the witness states that the defendant firm were packing pork for the English market; that the defendants Whitnah are farmers and dealers in stock; that defendant Bell, prior to the time the defendants Whitnah went into business with him, had been in business at Canton, first in the name of Humphrey Bell, and afterwards in the name of Ingersoll & Bell; that the last-named firm had dissolved by the death of Mr. Ingersoll, about October, 1877; that witness' bank had handled drafts of Ingersoll & Bell in the same kind of business; sent such drafts to Chicago.

The firm of Humphrey Bell & Co. was formed in December, 1877.

I knew of the negotiations as to the forming this firm, before they entered into partnership.

Prior to that time defendant Bell came to me for an advance of money to carry on his business, his partner having just died.

I stated to him that we would make advances if he could procure partners who were responsible, but could not let him have money upon his own name. I saw the two Whitnahs before the partnership was formed—H. A. Whitnah first. He said that before going into the partnership he desired to know something of Mr. Bell's
109 character and habits, and in regard to the shipment of products, and the manner of conducting the business. I told him that I regarded Bell as an honest man and a good financial manager, and explained to him the mode of shipments, stating to him that attached to the bills of exchange were bills of lading, which controlled the goods, held the goods, until the payment of the drafts, and that there was very little probability of loss under those circumstances; possibly a depreciation in the goods, but that would be slight.

I said to him that I had been conducting business for Ingersoll & Bell, which had been satisfactory, and if it was continued with us I would look after it, as I had for them, and do my best to save them from loss. Afterwards I said the same in substance, substantially in the same words, to both the Messrs. Whitnah, they informing me that they were negotiating to enter into partnership with Mr. Bell.

Afterward, Mr. Bell informed me that by their partnership articles for borrowed money they should sign their names individually.

After the partnership was formed there were bills drawn by the firm with bills of lading attached. The drafts were paid out of the proceeds of the meats sent forward, I suppose; they never came back.

110 There was no negotiations or communication between me or my bank and the plaintiff or any of its officers or employees, in regard to the drafts in question in this suit otherwise than by letter.

Counsel for defendant moved the court to strike out the evidence of witness Heald, which had been admitted, as to the negotiation between the Chicago bank and the Canton bank, on the ground that the letters are the best evidence; there being no other negotiation between them, the admission of such evidence having been objected to at the time, which motion was overruled by the court; to which ruling of the court counsel for defendants then and there duly excepted.

Witness, continuing, says: He never had any conversation or gave any notice to either of the defendants Whitnah in regard to the service of protest.

I know they did not know of these drafts until some time after this suit was commenced.

I did not advise them that Turner had not paid the drafts July 25, 1878.

I forwarded to plaintiff to apply on account of the drafts in question $1,000.

The money on account of these drafts was drawn out of my bank
on defendants' checks to their customers, I think mainly after
111 the proceeds of the drafts were received, although some time
they overdrew their account.

On redirect examination, witness says:

The $1,000 sent on account of these drafts was sent by direction of defendant Bell, and was defendants' money.

The way I came to send it was, Mr. Bell stated that he had arranged to have that sent forward to the plaintiff as margin; had so arranged with plaintiff. The conversation I have mentioned with defendants Whitnah, which occurred prior to the formation of the defendent firm, was in December, 1877.

No person was present representing the plaintiff.

Upon recross-examination witness says:

In regard to the conversation with Mr. Bell, in regard to sending said $1,000 to plaintiff, the plaintiff had sent to me a letter demanding the reimbursement. I informed Mr. Bell of that letter and he stated that he had written to his friend, Mr. Foster, living in Chicago, to inquire of the bank what was meant by that demand, so he (Bell) supposed that meat was held for the payment of the drafts, and it was unexplainable to him why they should demand pay for
the drafts when, as he supposed, the drafts were paid, or
112 nearly so, by the meats held by plaintiff. Mr. Foster replied
that he had been to see the officers of plaintiff, and that the officers of plaintiff stated that it was simply a formal demand, that all they wanted was the margin.

Mr. Foster asked them how much, and they named a thousand dollars, and Mr. Bell gave me $1,000 in response to that, and requested me to send it, as a margin, to cover what might be short in the meats.

I did not mean to be understood in redirect examination as stating that Mr. Bell himself saw plaintiff or its officers, but that he had requested Mr. Foster to go for him.

I understand a "margin" to be the putting up of a sum of money to cover fluctuations, in the price of the product, or whatever is being dealt in.

In this matter I understand it to be to cover any shortage in the sale of meats, or to make up whatever deficiency the meats might lack of paying the drafts.

The deposition of David Beeson was read in evidence, on behalf of the plaintiff. He states in substance:

Ans. Book-keeper. In the spring of 1878 was teller of the First National Bank of Canton, Illinois. (Witness identifies drafts in
question.)
113 When the last draft matured received letter from First National Bank of Chicago, advising protest and giving amount of fees and cablegram; showed it to Mr. Bell, and we talked the matter over.

It was understood that we had authority to remit the fees, which we did, and charged to the regular account.

Afterwards the certificates of protest of the three drafts came; I showed them to Mr. Bell, either the day they were received or the day following.

Gave the letter from Gage to Mr. Bell to make up his case.

Cross-examination by defendants' attorney:

Mr. Heald told me that the letters and papers had been given to Mr. Bell. Did not deliver them myself. My only knowledge as to final delivery over of these letters is from Mr. Heald.

LYMAN J. GAGE, called by plaintiff, testified: That he was cashier of plaintiff's bank and had been about 14 years.

The drafts in evidence in this case came into the possession of plaintiff about the dates they bear, or a day or two after, from the First National Bank of Canton, Illinois. They came by mail, enclosed in letters of March 4th and 11th, which have been read
114 in evidence.

Q. How came these drafts to be sent to your bank, if you know?

A. I suppose I know. Some time previous to these drafts, Mr. Bolton, who has the more immediate charge of these foreign drafts, came to my desk and informed me.

At this point attorneys for defendants objected to witness stating what Mr. Bolton or others told him, which objection was overruled by the court; to which ruling counsel for defendants then and there excepted.

Witness continues: That a representative of the firm of Humphrey Bell & Co. was in his department of our bank, proposing to negotiate with our bank bills of exchange upon parties in Great Britain, drawn against shipments of provision; that such bills would be negotiated there, and bear the endorsement of the First National Bank of Canton. I either went down with him and saw Mr. Bell, the representative, or I consented.

Here attorneys for defendants objected to the witness stating what he said to Mr. Bolton, which objection was overruled by the court; to which ruling the attorneys for defendants then and there duly excepted.

115 Witness proceeds:

I told Mr. Bolton that he could close the arrangement with those parties, to the effect, that we would buy such bills in the course of business of Bell & Co., they being endorsed by the First National Bank of Canton.

In pursuance of that arrangement these bills came into the hands of the plaintiff.

My bank had had no correspondence with the Canton bank prior to that time, in regard to these particular drafts, that I know of.

Q. Now, when these bills were received at your bank what, if anything, was done in regard to them?

Defendants' attorney objected to any statement by witness in answer to this question, except as to such facts as may be within his personal knowledge; which objection was overruled by the court, and exception duly entered by defendants' attorneys.

A. The value of them in dollars was sent to the Commercial National Bank of Chicago for the credit of the First National Bank of Canton, immediately after the date of the letters enclosing the drafts.

116 The drafts are in pounds sterling. We gave the whole value of the drafts at the current purchase value the days they were received.

These drafts are what we call foreign bills of exchange.

By plaintiff's attorney:

Q. What was the nature of this transaction, so far as the First National Bank of Chicago was concerned; in other words, did yon receive these drafts for collection on account of the First National Bank of Canton or not?

To which question attorneys for defendants objected; which objection was overruled by the court; to which ruling of the court defendants' attorneys then and there duly excepted.

Witness states:

We bought — gave the full equivalent for them; did not receive them for collection.

Plaintiff's attorney then asked witness whether these drafts were purchased by his bank in the due course of business, or rather in pursuance of the arrangement made with defendants, or with the representative of defendants.

To which question defendants' attorneys objected, upon the ground that this matter was in writing and can speak for itself to the jury,

117 and the parties ought not to be allowed afterwards to come into court and give their understanding when a crisis of a suit or litigation is reached, so as to make the articles by which they acted and by which they made their contract speak something entirely different; which objection was overruled by the court; to which ruling of the court defendants' attorneys then and there duly excepted.

Witness answers:

They were purchased in pursnance of arrangements previously spoken of with defendants.

The drafts were then sent off in due course of mail to the City Bank of London, our correspondent, for collection.

When the drafts, respectively, matured we received cablegrams from the City Bank of London announcing their non-payment.

The cablegram read "7983—7984—Tangle," which meant that certain drafts we had sent bearing those numbers had been protested for non-payment.

These two numbers refer to the two drafts dated March 4th.

We thereupon addressed the letter to Mr. Heald, cashier of the

First National Bank of Canton, dated May 23d, 1878, referred to in Mr. Heald's testimony, June 4th, 1878.

We received another cablegram reading "8107—Tangle," meaning that the drafts of March 11 had been protested for non-payment. The same day we sent a letter to the Canton bank advising them of the fact, which is the letter dated June 4th, 1878, referred to in Mr. Heald's testimony. 118

In due course of mail we received certificates of protest from the City Bank, and forwarded them to the Canton bank.

Cross-examination by defendants' attorneys:

I do not distinctly remember whether I had seen Mr. Bell personally prior to the negotiation of these bills. The interview between Mr. Bolton and Mr. Bell was some weeks previous to the receipt of these drafts which came into the hands of Mr. Bolton, who has charge of that department. The endorsement of the plaintiff bank is upon the bills, put there by Mr. H. R. Simons, assistant cashier. I have no recollection whether I saw the bills at that time

I have been examined as a witness twice in this case before this time. Cannot remember whether upon my last examination I stated that I did not think I saw these drafts.

I have no positive recollection now as to whether I saw them. I cannot now recollect that I had any personal knowledge of these bills being discounted, or being bought, or otherwise by my bank, aside from information derived from the books of our bank or persons connected with the bank. All that I have stated in regard to that is hearsay and information obtained from books of my bank. I had no other personal knowledge that I remember of. I had no personal knowlege of any money being sent to the Commercial National Bank in this matter. The bills of lading for these meats were attached to these drafts. 119

(Witness here identified original duplicate of bills of lading.)

The duplicates of these bills were sent to the City Bank of London, and, no doubt, surrendered to the steamboat company when the meats were procured.

In answer to a question by the court, the witness states that the general course of business in such matters is about in this manner:

A transaction rests largely upon the shipment of the property. These bills of lading are made out by the transportation company that has facilities to carry the stuff clear through to its destination on the other side of the Atlantic.

These bills of lading are made subject to the shipper, as a rule, almost uniformly so. When endorsed by the shipper and placed in the hands of another party it clothes that second party with authority, by which he can go to the transportation company at the place of destination, and secure a delivery of the property itself. 120

These drafts, in common with other drafts, were sent forward to the City Bank of London.

They were inspected by the acceptor, and the documents were remanded, attached, pending the maturity of the bill, or the taking of it up, under the rebate of interest at the Bank of England rate, which is allowable there when the acceptor can get his drafts and all the documents relating to it.

In case of such payment at or before maturity the acceptor or payer is entitled to the documents, and with them he can go and get his goods.

In answer to defendants' attorneys witness continues:

The bills of lading in question were endorsed by defendants in blank; they were the shippers so designated on the bills of lading. The numbers or figures given in the cablegrams do not embrace the entire documents pertaining to the draft under that number. The numbers related to the drafts. We have no other number relating to the bills of lading. Where the number 8107 was used alone we would understand it referred to the draft. If the City Bank of London wanted to speak of documents relating to 8107, if it used the number alone, we would not understand anything but the draft.

121 If the bills of lading had gone forward, not properly endorsed, and they wished instruction regarding the mistake, they certainly would have said something, besides referring to the number; they would have quoted the documents or bills of lading 8107.

In a cablegram we would economize words, and if the subject-matter under advice was one that would be understood by the use of the number alone, we would avoid the use of any more words.

The bill of lading represents the property shipped, and goes forward as security for the drafts, and stands as collateral to the drafts. The proceeds to the extent of the amount of the draft are to be applied to its payment, and the balance of the proceeds of the shipment belong to the drawer of the draft.

The drawer of the drafts selects the consignee of the goods. The consignee is the drawee of the draft; when the drawee takes up the drafts he is entitled to the goods, and deals with them as his own. It is then between him and the drawer of the draft.

Up to the time of the payment of the draft the transportation company controls the goods. The bank which has the bills of lading in its possession controls the bill, which controls the goods; and up to that time the holder of the bill of lading holds the title to the goods as security for the draft. 122

May 25th, 1878, plaintiff sent a cablegram to the City Bank of London in these words: "Let Alfred Jacks, Liverpool, sell 7983, 7984, under your control." In that cablegram I use the numbers. These numbers don't refer to the drafts, but refer to the bills of lading.

We might then speak of the drafts and papers as referred to by the same language.

June 7th, 1878, we sent a cablegram to the City Bank of London in these words: "Let Jacks, Liverpool, sell 8107 under your control."

Neither of these cablegrams refer exclusively to the drafts; they refer to the bills of lading. In response to the first of these cablegrams we received a letter from the City Bank of London, dated June 1st, 1878. In that letter the City Bank of London says: We received your telegram, "Let Alfred Jacks, Liverpool, sell 7883, 7984, under your control," adding thereto, meaning that we were to place with Messrs. Alfred Jacks & Co. for sale, under our control, the property relating to the two drafts on Turner of eight hundred and fifty pounds and eight hundred pounds. In response to our second cablegram, and under date of June 8th, 1878, the City Bank
123 of London again wrote to the plaintiff, as follows: "Yesterday your telegram reading as follows came to hand: 'Let Jacks, Liverpool, sell 8107, under your control,' and we unders and the same to mean that we should let Messrs. Jacks & Co., of Liverpool, sell the property against your 8107 W. D. Turner, Jun'r, under our control."

These instructions have been duly attented to.

The plaintiff sent a letter dated September 12th, 1878, to the City Bank of London, stating as follows: "You don't state under whose control the meats are that A. Jacks & Co. are selling for your account; we trust they are still in your hands."

Plaintiff wrote to Mr. Heald, stating that the drafts had been protested, and requesting him to state what should be done with the property, requesting a reply by wire, and receiving in answer thereto a telegram dated May 24th or 25th, 1878, in these words: "Request Alfred Jacks to sell goods for benefit of drafts." Also received letter from Mr. Heald, stating that upon consultation with drawers of the drafts, he had sent above telegrams.

Our telegram to the City Bank of London, which I have given above, was sent after the receipt of the dispatch from Mr. Heald.

124 I took the telegram as received from Mr. Heald, added in the cablegram to the City Bank of London the words "under your control" for this reason: The amounts of the drafts were ten or eleven thousand dollars; they were covered by the bills of lading; I thought if we telegraphed the naked language, without the addition of those three words, the City Bank of London would consider it as an order to turn over the bills of lading at once to Alfred Jacks. It occurred to me that it might or it might not be necessary so to do, and that it would do no harm to throw in a clause that would leave it discretionary with the London Bank to deliver all, or any part of these goods or the bills of lading for them to Jacks, as they might consider it expedient instead of being under an order to deliver them all. I did not use that language for the purpose of directing the London Bank to retain control of the property.

I understood in July, 1878, that the bills of lading, which controlled the meats, were given up, so the meats had gone into other parties' hands.

The letter which I read of September 12th, 1878, to the City Bank of London, contains the words: "You don't state under whose con-

trol the meats are that A. Jacks & Co. are selling for your
125 account; we trust they are still in your hands," was undoubtedly written under a misapprehension.

My knowledge on September 12th, 1878, of the situation of affairs was as good as it is now. I did not write that letter personally. I am quite certain that in July there were advises from the London bank that the meats were in the possession of Jacks; and that this letter should have been written with that information in our hands was a mere inadvertence of the fact, or we were not clear as to our recollection of it. The letter dated September 16th, 1878, addressed to C. T. Heald, signed by me, contains these words: "When reimbursed, of course the property would be transferred to your order;" and yet I now say that I must have known of it before that time that the meats had been turned over to Jacks. That letter is not in contradiction with that knowledge.

Redirect examination by plaintiff's attorneys:

When the drafts in question came to our possession the original bills were attached thereto; also what we call letters of hypothecation, and perhaps certificates of insurance; of the last am not certain.

Letters of hypothecation identified by witness, and offered in evidence. They are as follows:

126 CANTON, ILL., *March 4th*, 1878.

To the Manager of the City Bank, London, England.

SIRS: We have this day sold to the First National Bank a bill of exchange for eight hundred and fifty pounds, on W. D. Turner, Jun'r, against a shipment of 120 boxes bacon. The agreement with the First National Bank is, that if said bill is accepted and the acceptance is satisfactory to you, the bill of lading is to be given up to him, without prejudice to your claim on us, in the event of the bill not being paid at maturity; but if they decline to accept, or if the acceptance is not satisfactory to you, or if the bill be not paid at maturity, then you are hereby authorized to retain the bill of lading, and at any time, at your discretion, to place the goods in the hands of your broker for sale, on account of whom it may concern, and apply the proceeds towards the payment of the bill; and in case of any deficiency we hereby agree to pay the amount of such deficiency to the First National Bank, on demand, and also, that if you should require the transfer of the "policy of marine insurance," the same shall be given, and in case of refusal to transfer by the parties drawn on, then you are to have the privilege of effecting a
127 special insurance, for cost of which you are to have a lien on the above merchandise.

Yours, respectfully,

HUMPHREY BELL & CO.

Insured in Liverpool.

The two other letters of hypothecation are the same, except one is dated March 11, and they refer to drafts for £800 sterling each.

Witness continues: Those papers were attached to the drafts with corresponding dates, and were forwarded with the drafts to the City Bank of London, as were insurance policies, if there were any.

Plaintiff received a letter May 25th from Heald, cashier, acknowledging receipt of the letter of May 23rd, and stating that upon consultation with the drawers of the protested drafts on Turner he had telegraphed, at their request, as follows: "Request Alfred Jacks to sell goods for benefit of drafts," and stating that Jacks & Co. had guaranteed to the drawers the payment of their drafts on Turner, and requesting to be advised promptly of any further information obtained regarding the matter. It was upon receipt of
128 the dispatch quoted in this letter that I cabled to the City Bank of London, adding the words "under your control." When the third draft was protested the same thing happened over again.

It is the custom for letters of hypothecation to go with the drafts and bills of lading.

By the COURT: I wish you would use the word "usage," because "custom" has a technical meaning in law.

The holders of the document are restricted and bound by the letters of hypothecation.

We received in due course of mail copy of letter from the City Bank of London to Jacks, dated 27th of May; also what purports to be copy of letter from Jacks to the City Bank of London, dated May 28th, both of which copies of letters plaintiff received from the City Bank of London in due course of mail, as it did also what purports to be copy of letter from W. D. Turner, Jun'r, dated June 1st, 1878, and what purports to be copy of letter from the City Bank of London to Jacks, dated June 7th, 1878, and copy of letter from Jacks to the City Bank of London, dated June 8th.

September 12th, 1878, plaintiff wrote a letter to the City Bank of London, and another on the 19th of September.

129 That part of the letter of 12th September read by the witness is as follows:

"You don't state in whose control the meats are, that Jacks is selling for our account, and trust they are still in your hands."

Mr. Bolton wrote that letter.

Letter from plaintiff to the City Bank of London, dated September 19th, offered in evidence by plaintiff.

Which was objected to by defendants' attorneys; which objection was overruled by the court, and exception by defendants duly entered.

Witness continues: This letter is in substance as follows; it copies cablegram, as follows: "Advice position of 7983 expedite sale," and adds that the former portion of this dispatch referred to property attached to the drafts on Turner, the sale of which had been entrusted to Jacks, of Liverpool, and that the drawers are getting uneasy on account of the delay that is created in the disposal of these meats.

130 Recross-examination:

In answer to defendants' attorneys, witness states:

That the copies of letters referred to were sent by the City Bank of London from time to time as they received them.

I think there has been no correspondence between myself or my bank and the Canton bank in regard to the expense of this suit. I don't remember of any. There has not been any understanding, by correspondence or otherwise, directly, and remember of no correspondence directly between the Canton bank and our bank on the point of any portion of the expenses of this suit being paid by the Canton bank. I think correspondence has been had between our attorneys and that bank on that subject.

My bank received a letter from Mr. Heald relating to that subject, which letter I turned over to our attorneys. The arrangement between the Chicago bank and the Canton bank was in writing, I think.

131 MONROE WILLARD, a witness examined on behalf of the plaintiff:

By plaintiff's attorneys:

Q. State, if you know, when the special endorsement over the signature of Humphrey Bell & Co. which is in the following words, "Pay First National Bank of Canton, Illinois, or order," was put on, and by whom.

Which question was objected to by defendants' attorneys; which objection was overruled by the court, to which ruling of the court counsel for defendants then and there duly excepted.

Q. That special endorsement on each of the drafts was put on by me prior to the filing of the declaration in this case under the direction of plaintiff's attorneys, in whose office I was then employed.

132 GEORGE BOULTON, a witness examined on behalf of the plaintiff, in answer to plaintiff's attorney, stated:

That he had charge of the exchange department—purchase and sale of foreign exchange in plaintiff bank—and has had for over fourteen years.

Knows defendant Bell. Prior to March 4th, 1878, he had a conversation or interview, either directly with Mr. Bell or with parties who introduced the subject to me on his account.

That was three or four months, more or less, prior to the March 4th, 1878.

Do not recollect whether it was with Bell personally. Recollect a member of the firm of John Morrell & Co. Either Mr. Foster or Mr. Griggson spoke to me of the matter of exchange, stating that Mr. Bell had been drawing bills from Canton, and had not been selling the same to advantage, asking if we would be willing to accept their exchange. I replied that their bill would be an out of town one, and we would not care to take it without a bank endorsement; then we would allow the usual rates. Whether Mr. Bell was present I cannot say. The conversation was relating to the purchase of bills, and I communicated it to Mr. Gage, probably the same day.

After that bills of exchange came to us bearing the endorse-
133 ment of the First National Bank of Canton.

By plaintiff's attorney:

Q. Did you have any other arrangement?

A. I bought the bills from Humphrey Bell & Co. with the endorsement of the First National Bank of Canton, Illinois.

Defendants' attorney moved to strike out this answer; which motion was overruled by the court, and exception thereto then and there duly entered by defendants' attorneys.

Witness continues: I know of no other arrangement about these bills than that which I have already stated.

We sent the bills forward to the City Bank of London. I attended to that personally. Mr. Gage did not sign the remittance. I was acting under the instructions of the officers of the plaintiff bank.

We placed the proceeds of these drafts to the credit of the First National Bank of Canton, Illinois, with the Commercial National Bank of Chicago, at the current value of the day, the same day the drafts were received.

July 19th, 1878, I wrote this letter to the Canton bank: I charge your account with drafts returned unpaid as follows:

| | |
|---|---|
| £2,450 | $11,992 75 |
| Interest | 62 27 |
| " | 73 98 |
| ¼ per cent. charge on dishonored bills | 29 98 |
| | 12,108 98 |

134 For which please make reimbursement. The meats are in the
hands of the brokers named by you for realization. When ac. sales are made we shall advise you promptly in the matter.

Cross-examination:

In answer to defendant's attorney, witness states:

The conversation with Mr. Bell, or somebody from him, which I referred to, was shortly before receiving the first bill of exchange. Could not say whether I had ever seen a bill prior to that time signed Humphrey Bell & Co.

The name of the firm of Humphrey Bell & Co. was mentioned at that interview; am sure Humphrey Bell was, and pretty sure Humphrey Bell & Co. I should say so, because it was almost immediately before the first bills came to us. I think that at the interview with Mr. Griggson or Mr. Foster the firm name of Humphrey Bell & Co. was mentioned.

It certainly was not Ingersoll & Bell.

I know both Mr. Foster and Mr. Griggson; their names are
135 Thomas Foster and Charles Griggson. I am not familiar

with the names of the firm of Ingersoll & Bell; could not say whether the plaintiff bank bought bills of exchange of Ingersoll & Bell.

My department in the bank is on the basement floor, and Mr. Gage's on the main floor.

Remember Mr. Foster saying something to me about the bills of exchange in suit immediately after protest; cannot say whether it was in the month of July. My recollection is he took exception to our course, or the course of our agent, the City Bank of London, about the delivery of the documents. Have no definite recollection about the conversation; no recollection as to when it was, or as to my saying anything about the $1,000 margin.

Redirect examination:

To plaintiff's attorney, witness answers:

The moneys received by the plaintiff bank on account of these drafts, so far as I know, is now endorsed on them.

The one thousand dollars received about July 26 has been credited upon these drafts. In answer to a question of how much appears by computation to be due upon these drafts, witness is to make computation and present it hereafter.

Recross examination:

136 The two endorsements of dividends from Turner's estate, appearing upon the drafts, were made on the other side of the water. The endorsements, dated February 17th, 1879, July 9th, 1880, and July 26th, 1878, were written on the bills last week or last Monday.

Redirect-examination:

The endorsements are all the amounts that were accounted to us from the other side of the water.

Which was all the testimony offered in chief by the plaintiff, except the testimony of witness Bolton, which was recalled by agreement. Whereupon the defendents, in order to sustain the issues in their behalf, introduced the following testimony:

Thomas D. Foster, in answer to defendants' attorney, testified:

That he is, and has been, a pork packer for thirteen years, residing now in Ottumwa, Iowa; knows the parties to this suit, 137 also knows Mr. Bolton, of First National Bank of Chicago; had a conversation with Mr. Bolton, July 23rd, 1878, about some drafts that had been drawn by Humphrey Bell & Co., and stated to Mr. Bolton that I had received a letter of Mr. Bell, saying that the First National Bank of Canton had received a communication from the plaintiff, claiming that certain drafts had been protested, and claiming the entire amount of the drafts. I asked Mr. Bolton the object in claiming the entire amount. He said that was a matter of form, and that they only wanted an amount as security for margin on the drafts; he said a thousand dollars would be satisfactory. I wrote to Mr. Bell the same day the result of this interview. Do not remember that anything was said about the meats having been given up. I saw Mr. Bolton in the summer of 1877, about drafts and shipments by Mr. Bell—at that time his firm name was Ingersoll and Bell—and then talked with Mr. Bolton in regard to the drafts by that firm. There was not, at that time, any such firm as Humphrey Bell & Co., that I am aware of. Have never had more than the two conversations I have mentioned with Mr. Bolton in regard to Mr. Bell.

Cross-examination by plaintiff's attorney:

138 Was living in Chicago in the summer, 1877. Left here in April, 1878. I remember that the first conversation was in the summer of 1877. Am certain of that. Cannot fix exactly the time, but it was between May and September.

To the COURT: I fix the date of the conversation, July 23rd, 1878, by a letter which I wrote Mr. Bell (which is here shown to the witness and identified).

ANDREW J. WHITNAH, a witness, in answer to defendants' attorney, testified in substance as follows:

Am one of the defendants in this case. Reside at Canton, Fulton county, Illinois. Have resided there sixteen years, and in that county forty-five years. Defendant H. A. Whitnah is my son. During the time [I] have lived in Fulton county my business has been farmer. Have known defendant Bell nine or ten years. My son and myself own the property where the packing was done at Canton. Bell's firm, before the firm of Humphrey, Bell & Co. was was formed, was Ingersoll & Bell. Ingersoll died before we
139 went in the firm.

Know Charles T. Heald, cashier of the Canton bank. I have known him the past twenty years. Before entering into partnership in the firm of Humphrey Bell & Co. my son and myself had a conversation with Mr. Heald at his bank about it.

Plaintiff objected to this evidence, which was admitted by the court upon condition that defendants should afterward connect the plaintiff with it.

At that conversation my son asked Mr. Heald about Mr. Bell's capacity and honesty, and all these things. Heald said he was as honorable a man as he had any dealings with. My son then asked Heald if there was any possible chance, if he went into partnership with him and sending the meats away, of losing any money on it, and Mr. Heald said if we let him (Heald) handle the meats as he had done, he would guarantee there would be no loss, and under these circumstances we drew up our articles. Mr. Heald told us about the bills of lading and drafts, and said the bills of lading went with the drafts, and all would pass through his hands and come back through his hands; don't remember whether he said anything about meats being given up before the drafts were paid.

140 After the partnership articles were drawn up we told Mr. Heald that when there was any considerable amount at stake each partner must sign his own individual name. We told Mr.

Heald that was in our partnership articles, which was consum-ated the last of November, 1877. I had nothing to do with the drawing of the drafts sued in this case. Never saw them before we were sent in this case. About the last of September, 1878, was as soon as I ever heard of drafts having been protested. We were then threatened with suit, I understood. Never heard until then that drafts had not been paid.

Fulton county is in the Southern United States court district of Illinois. Never had any conversation with Mr. Gage or any person connected with plaintiff bank in regard to these drafts, at any time or place. Mr. Heald never showed me any letter from plaintiff in regard to this matter prior to the time of the suit, and never informed me that plaintiff had written about drafts prior to that time.

Witness was asked by defendant's attorney whether he was familiar with packing meats and the drawing of drafts against them, or had any information in regard to the drawing of drafts and attaching bills of lading, except as was communicated to him by Mr. Heald, cashier of the Canton bank, in connection with entering into
141 partnership, at the time, he said if they would allow the drafts to go through his bank, he would take care of it.

Which the court instructed the witness not to answer; to which ruling of the court defendants' attorneys then and there duly excepted.

Cross-examination:

To plaintiff's attorney witness stated in substance as follows:

My Bell attended to the final business of Humphrey Bell & Co.

H. A. Whitnah, one of the defendants, a witness on behalf of the defendants, in answer to defendants, testified in substance as follows:

Have lived in Fulton county for 43 years; was born there; my business is principally that of farmer. Know Mr. Heald, cashier of the Canton bank. Mr. Bell's firm, immediately before forming
142 the firm of Humphrey Bell & Co., was Ingersoll & Bell.

Mr. Bell had a lease of the packing-house, with the privilege of purchasing; he had put some improvements on it, but said he had no money to purchase the property with and applied to me about partnership. Before the firm of Humphrey Bell & Co. was formed, I saw Mr. Heald twice in regard to the matter. The first time I was alone. Bell told me that Mr. Heald had sent for me to come and see him; that he wanted to see me and have a talk with me.

In answer to plaintiffs attorney, the court stated that this particular testimony went in, subject to the exception of plaintiff.

The witness proceeds:

I went into the bank, and Mr. Heald invited me back into his office, and said: I have been having a talk with Mr. Bell in regard to our business at the house, and said that Mr. Bell would like to have somebody to help him, with means to run the house; that if he (Heald) owned the property he would furnish Bell means to run it. I told Mr. Heald I didn't know anything about the business, and didn't care to do anything about it.

He replied that Bell was an upright and straightforward man, and had made money there, and could again, and he thought he ought to have help.

143 I said I didn't know anything about this foreign business; that Bell might pack meats for the foreign markets and ship them out of the country; that the former partner of Bell had failed, and was afraid that if I went in with him, that there might be some means by which he could get hold of the property and get the money back that he had put into the house, and therefore I refused to do anything about it. Mr. Heald then said: There is no trouble about it; the goods are all held for payment of the drafts that are drawn on them. I said I knew nothing about that. Mr. Heald then said, if you will trust this business with me, as it has been heretofore, I will guarantee that there will be no trouble about it. He said the bills of lading were attached to the drafts.

The second conversation was the same day, I think in the same place, when my father was present, and Mr. Heald stated substantially the same thing again.

After the partnership was formed our partnership agreement, I think, was shown to him.

Cross-examination:

144 To plaintiff's attorney witness stated substantially as follows:

Am 43 years old; I live eight and a half miles from Canton in the country; lived in Fulton county all my life; besides being principally a farmer, I have been in the shipping business—some stock, but outside of the firm of Humphrey Bell and Co.; not largely in the shipping business, worked at it some in the winter, but not much in the summer; for seven or eight years have been shipping in company with others; six or seven of us once engaged in the shipping of sixteen cars; I feed stock in the winter, and have for eight or ten years shipped some grain.

The conversations I had with Mr. Heald were about the 20th of November, 1877.

Humphrey Bell & Co. commenced, I think, the 21st of November, 1877. Mr. Heald was then cashier of the First National Bank of Canton; it was called Mr. Heald's Bank by almost everybody; I always understood it was a national bank.

The sign over the door was Mr. Heald's; I supposed him to be cashier. He said if Humphrey Bell & Co. would do their business with him he would guarantee there would be no loss. Humphrey Bell & Co. commenced business soon after, within a week or two, and kept on until we shut down the summer after.

145 The firm has never been dissolved. I think the business was two or three hundred hogs a week, perhaps not that much at the latter end of March. Think most was shipped to foreign markets. Mr. Heald's statement was not that, if we would trust our business to his bank he would do the best he could that we would

sustain no loss; I would never have put in a dollar, if he had talked that way to me; I did not ask it to be put in writing; I suppose the consideration he got from this was the handling the drafts. He did not ask a cent, no consideration talked of, or any advantage that would come to him.

The talk at that time as to the size of the business was about $25,000—that is, that it would take about $25,000 to run the business. I borrowed the money—part from Mr. Heald. Heald was to furnish money, and my father's and my notes were to be given at various times. We gave our notes for $25,000 for money we borrowed from him, and we both signed the notes, I think at 10 per cent. interest.

I renewed every 30, 60, and 90 days. No talk about what advantage Heald was to gain by guaranteeing our concern. Mr. Bell conducted most of the financial affairs of Humphrey Bell & Co.

I did not; I supposed it was in the hands of Mr. Heald;
146 it was done by Mr. Heald. Humphrey Bell & Co.'s employés
bought the goods, which were paid for out of this money by Mr. Bell, who kept the books. I never saw the books, and my father did not, so far as I know.

Left it with Mr. Bell.

In answer to question by the court, witness states:

I understood in my interview with Mr. Heald that he was to draw the drafts and send them forward with bills of lading for the purpose of shipping goods for the firm. Mr. Heald had the money there, and said the stuff was to go through his hands. I understood that drafts were to go forward. Did not know whether they could be the drafts of our firm. I never saw one. Am not accustomed to drawing drafts. In my business, pay for my stuff; know nothing of that. Never did any such thing in my life; never drew a draft in my life. When I send stuff here to Chicago I come with it and sell the stock and get the money back.

Redirect examination:

To defendant's attorneys, witness states:

Whenever any money was obtained by Humphrey Bell & Co. from the bank, so far as I know, the notes were signed individually, and not in the firm name of Humphrey Bell & Co. When we got
money we always signed our names.
147 There was no foreign shipping connected with my ship-
ping stock or grain.

The stock was shipped here, and the grain principally to Peoria. I paid no attention to the drafts. Never knew anything about the failure on these drafts until in fall; I was notified of the — sent here or about that time. Saw no letter from plaintiff prior to the commencement of this suit. No notice was given to me in any form by anybody, that the drafts in question had gone to protest. The first I heard of the fact there was any protest or anything claimed on these drafts was in the latter part of September or the 1st of October, 1878.

Recross-examination by plaintiff's attorney:

Humphrey Bell & Co. kept a bank account with the First National Bank of Canton. The checks were signed in the firm name by Mr. Bell. I did not know anything about the payment of $1,000 in connection with this transaction in July, 1878, until on the first trial of this cause. I never signed any checks of Humphrey, Bell & Co.

148 The deposition of RICHARD PLUM, taken in Liverpool on December 23, 1886, offered in evidence by defendant's attorney.

Objected to, by plaintiff's attorney, as irrelevant and incompetent; objection overruled by the court; to which ruling of the court exception was then and there entered by plaintiff's attorneys.

Am an accountant in Liverpool in the employ of Harwood, Banner and Son, accountants in that city, of which firm George Nicholson, the trustee of Alfred Jacks and Co.'s estate, is a member.

I have been employed by the trustee in the investigation of the books of Alfred Jacks & Co., and have compared the prose copy of the account sales made up by Jacks and Co.'s clerk (Baylis), with the entries in the bankrupt's books, from which such account sales were compiled by me, and found such account sales to correspond with the entries in the books, with the following exceptions:

The deposition then states a number of unimportant corrections in the accounts.

Upon cross-examination witness, in this deposition, states that the last receipt by Jacks and Co., in respect to the sales of the 50 boxes, appears by the books to have been August 15th 1878; the date of the last receipt, in respect to the 123 boxes, is August 20, 1878.

149 The three letters from A. Jacks & Co. to the City Bank, dated respectively 28th May, 8th June, and 27th August, are in the handwriting of Mr. Alfred Jacks.

They are now produced to me, marked "P," "Q," & "R," respectively.

Exhibit "P" accompanying this deposition, is letter from Alfred Jacks and Co. to the City Bank of London, dated Liverpool, 8th May, 1878, acknowledging receipt of letter from the City Bank enclosing bills of lading for 240 boxes of bacon for sale on account, and stating that these goods are, and have been for some time, slow of sale and the property much depressed, especially taking into account the dangerous state of many parts of the country, but we hope to be able to get these goods sold without loss, and to satisfy you that we have done our utmost to realize as quickly as is consistent with safe and satisfactory sales.

Exhibit "Q" is letter from Alfred Jacks and Co. to the City Bank, dated Liverpool, 8th June, 1878, acknowledging receipt of letter from City Bank, dated June 7th, enclosing bills of lading for 120 boxes bacon.

Exhibit "R" is letter from Alfred Jacks & Co. to the City Bank, dated Liverpool, 27th August, 1878, acknowledging receipt of letters from City Bank, dated August 22nd and August 26th, and stating

that these goods on coming into the possession of Jacks and
150 Co. were found to be stale and difficult to sell. That they go
off better in the fall of the year. That Jacks and Co. had them cleaned and resalted, and are going on with their sale, and hope shortly to make some progress and send you sales and remittances.

The deposition of DAVID GEORGE HOPE POLLOCK taken by plaintiff, at the same time and place with the deposition of Richard Plum.

Witness states in substance as follows: I am the assistant manager of the City Bank of London. As such assistant manager I wrote and sent to Alfred Jacks & Co. on their respective dates, four several letters dated 27th May, 7th June, 22nd and 26th August, 1878, true copies attached to deposition marked "S," "T," U," and "V," respectively. I received the letters marked "P," "Q," & "R" with Richard Plum- deposition.

Exhibit "S" is letter from Pollock, assistant manager, to Jacks and Co., dated 27th May, 1878, enclosing the bills of lading for 240 boxes of bacon, and stating that we shall feel obliged by your selling the goods on our account, as promptly, but as judiciously,
151 as possible, forwarding us net proceeds in due course account
of sales in duplicate. The property relates to two acceptances of W. D. Turner, Jr., of Liverpool, who has sent us a cover note of the Northern Insurance Company for £3,000.

Exhibit "T," letter from same to same, dated London 7th June, 1878, and stating in substance as follows:

By desire of our friend, the First National Bank of Chicago, I enclose bills of lading for 120 boxes bacon. I shall feel obliged by your disposing of the property as promptly, but as judiciously as possible, forwarding us in due course account sales in duplicate and remittance for the net proceeds. Accompanying the bills of lading you will find certificate of insurance for £3,000.

Exhibit "U," letter from same to same, dated August 22d, 1878, stating in substance:

We do not appear to have received the account sales of 240 packages bacon sent you for sale on the 27th May and 7th June, respectively. Please inform us what is the present position of these shipments.

Exhibit "V," letter from same to same, dated London August 26th, 1878, stating in substance as follows:

We do not appear to have received a reply to our note of 22nd
inst. respecting certain property placed by us with you for sale,
152 and I shall be obliged if you will advise me in the matter by
return of post.

Deposition of WM. D. TURNER, Jr., of Liverpool, taken by plaintiff at Liverpool October 29th, 1880, in substance as follows:

I have had large business transactions with Messrs. Humphrey Bell & Co., the defendants, commencing at the end of the year 1877 or beginning of 1878; purchased from them salted meats, and paid for them by honoring their drafts for the price. My transactions amounted to upward of £10,000.

My transactions with the defendants ceased in August, 1878, when I stopped payment. The last three bills for £800, £850, & £800, drawn by defendants on me and accepted by me, and which matured on the 21st May and 31st May, 1878, were dishonored.

Complete set of shipping documents, relating to the goods against which the bills were drawn, were attached to those bills. I never obtained delivery of the goods. At the time the bills matured the goods were in the custody of the City Bank of London. After the bills were dishonored the goods were placed by the City Bank in the hands of Alfred Jacks and Co. for sale. I saw the bills of lading attached to the bills; they correspond with the goods against which the bills were drawn.

153 Mr. Alfred Jacks told me in conversation the instructions which he had received from the City Bank of London with reference to the goods. I received no instructions whatever from defendants with reference to the goods.

There was a deficiency on the realization of the goods to the amount of £450, or thereabouts. The plaintiff, through its agent, the City Bank of London, proved against my estate for this deficiency.

Cross-examination by plaintiff's attorney:

When I said that the goods were in the custody of the City Bank of London I meant that they had full power over the goods by their holding the shipping documents.

It was stipulated that plaintiff might prove claims against estates of Wm. Turner, Jr., and Alfred Jacks & Co. without prejudice to either party.

Deposition of Alfred Jacks, of Liverpool, taken at the same time and place:

This deposition is in substance as follows:

I formerly carried on business as a provision broker in Liverpool under the firm name of Alfred Jacks and Co. In May, 1878, I received from the City Bank of London instructions with reference to the sale of salted provisions comprised in three bills of lading, which were handed over to me. I received letter of instructions from the City Bank as to the disposal of these goods. The letter dated 154 May 27th, 1878, from the City Bank of London to me, now produced, marked "S," relates to two of the bills of lading for 240 boxes ——.

I received instructions from the City Bank of London to sell the goods on their account. I sold the bulk of the goods before my bankruptcy, and the remainder was taken possession of by the trustee.

I was adjudicated bankrupt on 24th October, 1878. I knew that certain dishonored acceptances of W. D. Turner, Jr., related to these goods. A few days after receiving the letter marked "S" I received another letter from the City Bank of London relating to the third bill of lading. That letter is lost, but it contained similar instructions to those contained in the letter marked "S."

The goods were insured against fire by Turner, Jr., who transferred the insurance to the City Bank of London on his failure to meet the bills. With the exception of the goods which were taken possession of by the trustee, I sold all the goods comprised in the three bills of lading.

All the accounts in my books relating to these transactions were kept in the name of the City Bank of London.

Cross-examination by plaintiff's attorneys:

155 All the instructions which I received from the City Bank of London were contained in the two letters referred to.

There was nothing verbal. I used all the proper care in realizing on these goods, but when they came to my hands they were getting out of condition.

I never rendered any account sales to the City Bank, neither did I pay over to them any part of the proceeds.

Deposition of EDWARD BRADLEY ROOSE, taken by plaintiff, read by defendants' attorney, which is in substance as follows:

Am a trustee appointed under the liquidation proceedings of William D. Turner, Jr. Plaintiff has proved against Turner's estate for £450 14 7, the balance due to them as holder of three bills of exchange, drawn by the defendants upon and accepted by Turner. An office copy proof of debt and the bills of exchange annexed thereto, is produced by me and marked F. As such trustee I paid to plaintiff, through their proxy, the assistant manager of the City Bank of London, two dividends of five shillings and one shilling and three pence, respectively.

The dividend of five shillings was paid May 14th, 1879, amounting to £112 13 8, the 2nd dividend of 1*s.* 2*d.* in the pound
156 was paid July 14, 1879, amounting to £28 3 5, making total paid £140 17 1.

Deposition of ARTHUR BAYLIS, of Liverpool, read by defendants, in substance as follows:

Was in the employ of Alfred Jacks & Co., Liverpool, produce brokers, as book-keeper for about 9 months. While in their employ I kept all the accounts of the firm. I remember my employers in the spring of 1878 receiving instructions from the City Bank of London to sell certain goods on their behalf. Those instructions were in writing. The goods consisted of bacon, hams, and salted meats. A. Jacks & Co. sold the goods. I kept all the accounts of the firm and entered all the sales of these goods to the account of the City Bank of London. I prepared account sales of all the goods so sold from my employer's books. The documents marked "A" & "B," "C," & "D," respectively, now produced, are true copies of the account sales, prepared as aforesaid.

Cross-examination by plaintiff's attorney:

157 The original account sales were prepared by me for the

trustee under Jacks' bankruptcy. The dates on the left-hand side of the accounts are the dates of the sales, and the sales there represented to have been made were made on those dates.

The documents "A," "B," "C," & "D," referred to in this deposition, show in detail the sales of meats.

A summary of which is given in the testimony hereafter.

Deposition of George Nicholson, of Liverpool, read by defendants, in substance as follows:

Am a member of the firm of Harwood, Banner & Son., chartered accountants, and am trustee in the bankruptcy of Alfred Jacks, lately trading as Alfred Jacks & Co., in Liverpool. The order of adjudication is dated October 24th, 1878.

As such trustee have investigated the bankrupt's affairs. No account sales of the goods sold by Alfred Jacks, under the instructions of the City Bank of London, were rendered him.

After the adjudication the bankrupt's clerk, Arthur Baylis, made out account sales from the bankrupt's books and handed them to
me, and I forwarded them to the City Bank of London. I
158 gave no instructions to Baylis as to the form in which the
account sales should be made out.

The four documents marked "A," "B," "C," & "D," now produced, are true copies of the account sales so sent by me to the City Bank of London. I kept press copies. With the exception of 12 boxes of shoulders, all the goods comprised in the account sales were sold by Alfred Jacks, before his bankruptcy; those 12 boxes are all goods referred to in the account sales marked "B," under date of October 31st, 1878; these I sold, and they produced £30 3 8 gross, for which I accounted to the City Bank of London; I did not receive any instructions from the City Bank of London with reference to the sale of these goods; being perishable goods I disposed of them with as little delay as possible; after rendering the account sales produced, I discovered five other boxes of salted meat, part of the goods included in the three bills of lading; these I also sold and remitted the proceeds, amounting to £27 1 0, to the City Bank.

The plaintiff, The First National Bank of Chicago, proved on the bankrupt's estate for £1,932 17 6, the net proceeds of the goods, as appears by the account sales, after deducting the amount accounted for by me to the City Bank of London. There have been two dividends paid, amounting to 4 per cent. and a farthing in the £. The
two dividends were paid to the plaintiff's proxy July 6, 1880,
159 and amounted to £388 11 9.

The seven letters from the City Bank of London to my firm, dated, respectively, 29th October, 1878, 31st October, 8th November, 2d December, & 5th December, 1878, and 18th February, 4th April, 1879, now produced, marked "G," "H," & "K," respectively, relate to the goods in question.

Letter "G" is dated October 19th, and states: We should like to know what has been done with our goods; when were sales effected, and what has become of the proceeds?

Letter "H" asks for account sales and what amount has not been collected prior to Jacks' stoppage.

Letter "K" asks for copies of invoices relating to the shipment of meats.

The reading of each of the above depositions, plaintiff's attorneys preserve a general objection and exception for irrelevancy and incompetency.

Defendants then offered in evidence duplicate originals of the three bills of lading which were attached to the three drafts in question, which show shipments by defendants of 360 boxes of meats (120 boxes in each bill of lading) to Liverpool, England, by their bills of lading, deliverable to the order of defendants, which bills of lading are endorsed by the defendants.

160 Defendants then read in evidence letters written by plaintiff to the City Bank of London, stating in substance as follows:

*Letter dated September 19th*, 1878.

Advise position 7983, expedite sale, which refers to the property attached to drafts on Turner, the sale of which had been entrusted to Alfred Jacks and Co., Liverpool.

The drawers are getting uneasy, on account of the delay that has occurred in the disposal of these meats.

Letter dated September 30th, 1878, stating in substance as follows;

We very much regret the position of affairs in regard to the bacon placed with Alfred Jacks & Co. for sale, the more so, as the drawers have notified us that they take exception to your course, in having given up the propertp to the broker, when the instructions were that the property was to be sold by A. Jacks & Co., but only under your control, and that the intention was that the meats should be delivered only upon payment or against such securities as are usually required in similar case. We are placed between you and the parties to the bills. We will not, however, attempt to pass upon the question of a liability on your part, as claimed by them, but will ask you to give us your views on the point, that we may, if possible, successfully meet the objection urged by them, or, if
161 their claim is well founded, such acknowledgement thereof from you as may be proper.

Letter dated October 16th, 1878, stating in substance as follows:

Drawers of Turner drafts decline to reimburse us for the same, we are compelled to bring suit against them.

The claim they set up is the failure on your part to retain control of the property, they stating that no authority was ever given to allow the property to pass out of your hands until payment of proceeds was made, and asking for letter of hypothecation and duplicate bills of lading.

Defendants then read in evidence the following correspondence between plaintiff and The First National Bank of Canton, and their respective officers, in substance as follows:

George D. Bolton, for cashier, (admitted by plaintiff's attorneys that Bolton was authorized to write on behalf of plaintiff), to Heald, cashier, dated May 23, 1878:

Am advised by cable to-day that the two Turner drafts, dated March 4th, have gone to protest for non-payment.

Be kind enough to advise me by wire what disposition shall be made of the property. I charge your account for cablegram $4.25.

*Heald to Plaintiff, dated May 25th*, 1878.

Yours of the 23rd received. Upon consultation with
162 drawers of protested drafts, I have advised you by telegram,
at their request, as follows: "Request Alfred Jacks to sell goods for benefit of drafts." Jacks & Co. have guaranteed the drawers the payment of their drafts on Turner. Advise me of any further information you obtain regarding the matter. I enclose $4.25 for cablegram.

*Boulton to Heald, dated May* 28, 1878.

As requested in yours of 25th, have cabled City Bank, London, "Let Alfred Jacks, Liverpool, sell property under your control." Cost of cablegram I charge you $11.16.

*Boulton to Heald, dated June 4th*, 1878.

I have to day advice that Bell & Co.'s draft on Turner, March 11th, 800 pounds, has been protested for non-payment. You will please instruct us in reference to it. I hand you herewith protests of similar drafts, 800 & 850 pounds, & charge acct. for costs of same, $5.16, & for cablegram $4.30.

*Heald to Gage, dated June* 6, 1878.

Have this morning advised you by telegraph to request Alfred Jacks to sell goods for benefit of draft as before.

I inclose draft for protest fees and cablegram, $9.46.

*Boulton to Heald, June* 6, 1878.

As requested in your telegram of to-day have cabled City Bank, London, to "let Jacks, Liverpool, sell property against draft on Turner under your control."

I charge your account cost of message, $9.35.

163 *Boulton to Heald, July 19th*, 1878.

I charge your account with Turner drafts returned £2,450, sterling, with interest and expenses, amounting to $12,108.98, for which please make reimbursement.

The meats are in the hands of the broker, named by you, for realization.

When account sales is made, will advise you promptly.

### *Heald to Boulton, July 25th,* 1878.

Yours of 19th received regarding reimbursement for protested drafts on Turner. "I hand you draft $1,000 for margin, and hope you will consent to carry the matter, till returns are received from the sale of stuff. Will this be satisfactory?"

### *Boulton to Heald, July 26th,* 1878.

Yours of 25th received with enclosure, as requested. We will let the matter stand in abeyance for the present.

### *Boulton to Heald, September 13th,* 1878.

Am just in receipt of advice, by cable, of the failure of Alfred Jacks & Co., Liverpool, the brokers in whose hands you instructed us to place the meats attached to the Humphrey Bell & Co.'s drafts, and have now to request the reimbursement as per my letter of July 19th, less $1,000.

### *Heald to Boulton, September* 14, 1878.

Yours of the 13th at hand. We do not understand why you repeat this demand upon us, for entire reimbursement for the 164 Bell drafts. The meats or proceeds of course are and have been at your disposal, although Bell & Co. named the brokers to dispose of them, they expect you to take the customary broker's guarantee, and they understand the meats have been disposed of, at least a portion of them, for benefit of drafts, as requested. What has been done with proceeds?

It was expected they were, of course, applied upon the protested drafts of Turner.

Bell has cabled to ascertain the condition of the matter, & upon receiving advice will write you further.

### *Gage, Cashier, to Heald, dated September* 16, 1878.

Yours of the 14th received. You do not seem to quite understand the nature of your liability on the drafts. We have a right to immediate reimbursement, and any delay or indulgence in asserting this right is a matter of mere grace or favor.

"When reimbursed, of course, the property would be transferred to your orders, but we are under no obligations to await reimbursement from the property itself." In this case we have, as requested by you, held the bills over due and also followed your directions as to disposition of the property.

The season has come when we can use our funds in other directions, and do not wish to await longer the apparently slow conversion of the property pledged.

### 165 *Heald to Gage, September* 17, 1878.

Yours of 16th received. May we trespass on your grace a little farther, by asking that you direct your agents by cable or otherwise to immediately dispose of all unsold goods in the soonest way possible, and also take steps to recover from Jacks & Co. all proceeds of their sales, upon their broker's guarantee if necessary, over which, I suppose we would have no control to recover, if we reimburse you.

We desire that the stuff be immediately realized upon and applied, & had no thought of such a delay as has already occurred; in fact, supposed the whole matter had been settled ere this.

When this is done and we are advised of our liability we will promptly meet the balance. If you deem further margins necessary please advise me how much. We hope the matter may be adjusted at once.

*Gage, Cashier, to Heald, September 20th,* 1878.

We this day received the following advice from our London bank by cable:

"Jacks' affairs great confusion; 7983–7984, 8107 mostly untraceable; doing what possible."

The numbers used refer to the three lots of goods held by him for
sale on account of your client's drafts. It is evident from this advice
that the amounts realized from these goods is doubtful and
166 uncertain as to date. We therefore renew our request for an
immediate adjustment of the drafts. We enclose statement
of your liability in the transaction, $11,240.

On settlement of same, we will give such order to our London bank concerning the matter in Jacks' hands, as you may direct.

*Boulton to Heald, September* 30, 1878.

In relation to Jacks' affairs the only additional information I have to give you is that the brokers who are going through Jacks & Co.'s stock inform us that only 10 boxes of Bell's meat have been found in stock. Jacks' books are in arrears, and it is impossible to say whether in the funds handed over by them there is any amount that can be traced as proceeds of property sold on your account. The condition of the meat is said to be very bad, & ¾ of the original was said to have been disposed of in France, & a large portion of it condemned by the French authorities as being putrid.

It is evident from the above that the avails of the property will come into our hands but slowly. I have again to request that you make reimbursement for the dishonored bills.

*Gage to the Canton Bank, October 7th,* 1878.

Unless satisfactory adjustment of your liability as endorsed on
Humphrey Bell & Co. is made at once, we shall be obliged
167 to commence action thereon.

We dislike to address you in these terms, but this matter must be closed up. We see no reason why you should not pay, and think the indulgence already shown should insure prompt action by you.

*Heald to Gage, October* 14, 1878.

We are unable to persuade Bell & Co. to comply with your demand, and in case we voluntarily reimburse you, as demanded, a new complication enters into the case, which may seriously affect our position.

We have one request & proposition to make you. Will you bring your suit against Bell & Co., direct upon our entering into an agreement to cash your judgment, and take an assignment of it immediately upon its being secured?

It is not improbable that we may have to fight the case over with them after we are through with you, unless this course is pursued.

The following letters were read by defendants' attorney:

*Letter of Hitchcock, Dupee & Judah, Attorneys for Plaintiffs, to Heald, Cashier, dated October 15th,* 1878.

Mr. Gage, of First National Bank of Chicago, has handed us your letter of yesterday for attention and answer.

168 Plaintiff is willing, at your request, to sue Bell & Co. directly, your bank giving it a bond, with two good sureties, that it will cash the judgment *vs.* Bell & Co. upon its entry, and will pay one-half of the costs and expenses of the suit, the only object of our bank in thus bringing the suit being to accommodate you, save half the costs, and get the assurance of your obligation to take up the judgment.

The proofs, of course, in a case against your bank would be more simple and direct than in a case *vs.* Bell & Co., according to our views; but we do not consider that of importance, as Mr. Gage wishes to be of service to your bank if he can.

If you wish to have us sue under such conditions let us hear from you, and we will prepare the bond, and will wish to have you put us in the way of finding Bell & Co. for service of process in this United States district, if they, or any of them, are in the habit of coming here.

*Heald to Hitchcock, Dupee & Judah, October 17th,* 1878.

Yours of 15th received. Gage's kindness is appreciated. Conditions named by you satisfactory. You can prepare bond. Bell is frequently in your city. We can advise you by telegraph of
169 any visit there, so you may obtain service upon him, as you desire.

*Hitchcock, Dupee & Judah to Heald, October 18th,* 1878.

In answer to yours of yesterday, we send you form of bond.

When you notify us that Bell is coming, give us all information you can—as to where he stops, who he has business with—so that we may be sure to get service on him, or some other member of the firm.

If we serve one here, we can then serve others in their own district.

*Heald to Hitchcock, Dupee & Judah, October* 21, 1878.

Yours of 18th at hand. We have executed the bond, which was satisfactory, excepting one point, making the result of the suit conclusive, which we cover by an additional clause. Bell will likely have to go to Chicago soon to arrange for disposing of their bills, as they are about to resume packing, and we decline to negotiate more of their bills for them. He will likely consult with Mr. Kent, who is known at plaintiff's, though perhaps it would not be safe to advise him of your design, for he is a warm friend of Bell's.

170 *Hitchcock, Dupee & Judah, October* 23, 1878.

The stipulation added by you to the bond is not satisfactory.

It releases your bank no matter if we fail in obtaining judgment *vs.* Bell & Co. We may fail in making proof of notice, or something to that effect, sufficient to bind Bell & Co., and yet have a good action against you. We cannot take the responsibility of releasing your bank at this stage of the proceedings.

We therefore send you a new book for execution.

*Heald to Hitchcock, Dupee & Judah, October 28th*, 1878.

We have executed and return herewith new bond as prepared by you.

*Hitchcock, Dupee & Judah, October 31st*, 1878.

New bond received. On receipt of yours of yesterday, we commenced suit against Bell & Co., and have been trying to-day to get service on Whitnah at stock-yards, but think he must have sold out at Peoria.

We now commence suit in southern district of Illinois also, to get service there, if impossible to do so here.

Advise us of the coming of any member of the firm to this neighborhood.

*Hitchcock, Dupee & Judah, November* 7, 1878.

We take the liberty of reminding you that we wish to be
171 notified at once of the visit of any member of the firm of
Humphrey Bell & Co. to this neighborhood, even though they should be served previously in your district. On getting service here we can dismiss there and prosecute in our own court.

A description of person might assist us.

Defendants' attorneys then offered in evidence the bond referred to in the above correspondence:

Which is in the penal sum of $15,000; dated October 20th, 1878; condition of which is that plaintiff, at the request of Canton bank, is to bring suit against Bell & Co. upon the drafts in question, and that if plaintiff receives a final judgment upon the drafts against Bell & Co., bondsmen shall thereupon purchase such judgment of plaintiff at the full face value thereof, and interest, and court costs, and pay one-half of the plaintiff's attorneys' fees and expenses; provided that the execution of such bond, and the commencement and prosecution of the suit until full payment be obtained shall in any manner discharge the Canton bank upon its endorsements of said drafts.

172 HUMPHREY BELL, one of the defendants, in answer to defendants' attorney, testified:

First saw Mr. Boulton, who is connected with the plaintiff bank, in the summer of 1877. Had never seen Mr. Gage, cashier of plaintiff, until after these drafts were purchased.

I was a member of the firm of Ingersoll and Bell, at Canton, before the firm of Humphrey Bell & Co. was formed. Mr. Ingersoll died in September, 1877. After Mr. Ingersoll died, and before the firm of Humphrey Bell & Co. was formed, I talked with Mr. Heald about a new firm; he said if I could get a partner of financial ability he would extend credit to the extent of $25,000.

Mr. Heald suggested the Messrs. Whitnah, and said he would like to see them. I took Mr. Whitnah, Jr., over to see Heald; did not hear the conversation between them. On Monday following Saturday when the firm of Humphrey Bell & Co. was formed I showed the partnership agreement to Mr. Heald; he read it. Defendant firm had $25,000 of money of Mr. Heald's bank, which was procured upon notes and not upon drafts. The notes were signed by the members of the firm individually.

Prior to the time the drafts in question were drawn I never
173 saw Mr. Boulton but once; that was in the summer of 1877.
I was introduced to him by Mr. Griggson, who had business at the bank, and I went with him casually after we had dined together. Upon my being introduced Mr. Boulton said: We have had some of your drafts, bought of other parties, and suggested that they come direct, but not through another bank.

That is all the interview I had with him; never had any interview with Mr. Gage in regard to their taking any draft; at the time of the conversation with Mr. Boulton the firm of Humphrey Bell & Co. had not been formed, and no drafts up to that time had been signed in the firm name of Humphrey Bell & Co.

The signature to the drafts referred to by Mr. Boulton was Ingersoll and Bell. I never made any arrangement with anybody connected with plaintiff, at any time, in regard to their purchasing Humphrey Bell & Co.'s drafts, nor did anybody else, to my knowledge; no one did so with my authority.

It was perfectly understood between Mr. Heald and myself that the meats represented by bills of lading were not given up.

Had drawn other drafts in the same manner with Mr. Heald; had done so for Ingersoll & Bell; that firm lasted about a year.

174 By defendants' attorney:

Q. Had any of the meats or goods represented by the bills of lading ever been given up to your knowledge?

Objected to by plaintiff's attorney, which objection was sustained by the court; to which ruling of the court defendants' attorney then and there excepted.

Q. Had Mr. Heald, or the bank which he represented, to your knowledge, ever authorized the giving up of any of the meats represented by the bills of lading that were attached to the drafts?

Same objection, sustained by the court, and exception by the defendants' attorneys, as to the last question.

Have had large experience as to drawing of drafts, with a large exporting house with which I was connected, after 1864; have been conversant with the usage in regard to foreign shipments during that time; been in it all the time.

By defendants' attorney:

Q. What, during that time, was the usage as to the surrender of meats or property represented by the bills of lading?

Objected to by plaintiff's attorneys; objection sustained by the court, to which ruling of the court defendants' attorneys then and there duly excepted.

175 Am familiar with general usage of business in the matter of foreign shipments, where there are drafts drawn and bills of lading attached.

Have had a little business on the other side, but not as much as on this side; am familiar with business on the other side of the Atlantic; have been away from there since 1864, except two visits. In the course of my business experience, which has been largely in New York and Canada, and what I have done in Canton during eight or nine years, I have drawn hundreds of drafts just similar to the ones in question, with the same kind of documents attached, which have gone through in the same way, and the goods have been controlled by the party who bought the bills of exchange.

Never knew, either on my own account or firms that I have been in business with, bills of exchange or bills of lading to be given up without the payment of the drafts.

The first I heard of any trouble about the Turner drafts in question was when Mr. Heald received a letter from plaintiff in May. Did not inform the Messrs. Whitnah, or either of them. Mr. Heald showed me Mr. Gage's letter, or Mr. Bolton's, that the drafts had gone to protest, and asked what disposition should be made of the property.

176 Mr. Heald and I consulted and concluded to send the dispatch, "Request Alfred Jacks to sell goods for benefit of drafts," which we did, with the distinct understanding that it controlled the meats; it was so talked between us; not only was it talked of, but it was positively instructed that the meats should be held under the control of the City Bank of London.

I said to Mr. Heald at that time that the meats were not to be given up.

By the court:

"That answer is ruled out, except so far as it is embodied in the dispatch."

Witness continues:

Have had many talks with Mr. Heald about this matter; he showed me the correspondence between plaintiff and himself.

I received notice of the second protest, and instructed Mr. Heald, just the same as before, to request Alfred Jacks & Co. to sell goods for benefit of drafts.

By defendants' attorney:

Q. "Was there any conversation between you and Mr. Heald, after this notice to you of the protest on the part of the bank, as to the goods being given up?"

By the court:

"You need not answer that."

To which ruling of the court counsel for defendants then and there duly excepted. 177

Witness, continuing:

There were other drafts drawn after the formation of the firm of Humphrey Bell & Co., like those in question, with bills of lading attached.

Q. Were the meats ever given up on those?

Objected to by plaintiff's attorney. Objection sustained by the court; to which ruling of the court counsel for defendants then and there duly excepted.

Q. Were they paid out of the proceeds of the meats?

Objected to by plaintiff's attorneys. Objection sustained by the court; to which ruling of the court defendants' attorneys then and there duly excepted.

Witness, in answer to further question, stated:

Neither myself nor my firm was ever called upon to pay anything on account of any such drafts.

Defendants' attorneys then asked the following three questions, to each of which plaintiff's attorney objected, and objection sustained by the court; to which ruling of ths court, as to each of the said questions, defendants' attorneys then and there duly excepted.

1 Q. Had Messrs. Whitnah, or either one of them, any knowledge of the drawing of these drafts? 178

2. Q. Did Mr. Heald confer with the Messrs. Whitnah before accepting these drafts or paying money on them?

3 Q. Were the individual signatures of either the Messrs. Whitnah furnished the First National Bank of Canton upon or in connection with these drafts?

Q. Was the money that was paid by the First National Bank of Canton paid before or after these drafts were delivered by you to that bank?

Witness, continuing, in answer to last question:

The Canton bank paid out money upon our checks, on account of these drafts, before the drafts were given to that bank; cannot say exactly how much, but to a considerable amount; we received money from that bank that was paid out of the proceeds of these drafts.

Referring to a statement in letter from Heald to plaintiff, dated May 25th, that Jacks had guaranteed to the drawers the payments of the drafts in question, the witness added: That reference was, that Jacks, acting as broker, had procured for me W. D. Turner as a customer, and sold to him these goods, for which I was to pay Jacks a brokerage, and for so doing he was to guarantee the sale.

These goods against which these drafts were drawn had been so sold to Turner by Jacks, as broker, and he guaranteed the sale. 179

Cross-examination:

Jacks did business under the firm name of Jacks & Co.

Jacks had done business with me since the firm of Humphrey Bell & Co. was formed.

Ingersoll & Bell had not done business with him. Six or seven similar sales had been made before this one, and we drew upon them the same way.

My firm had not been consigning goods to Jacks before this time.

Ingersoll & Bell were in business together not quite a year; they sold their drafts during that time to the First National Bank of Canton.

The witness Charles T. Heald, recalled by defendants, testified:

180 Received the letter from plaintiff that stated that the Turner drafts had been protested.

I saw Mr. Bell the same day.

There was a conversation between us.

By defendants' attorney:

Q. In that conversation between you and Mr. Bell, was anything said about the meats?

Objected to by plaintiff's attorney, that is not admissible any further than to show that it resulted in sending this dispatch; to which ruling of the court defendants' attorneys then and there duly excepted.

Mr. Bell instructed me to telegraph to plaintiff, in response to their letter, just the words of that dispatch.

By defendants' attorney:

Q. Was that all he said about those instructions, just simply to give you those words?

Objected to by plaintiff's attorneys. Objection sustained by the court; to which ruling of the court defendants' attorneys then and there duly excepted.

By defendants' attorneys:

Q. Upon receipt of that letter and your communication of the contents thereof to Mr. Bell, stating that the first two Turner drafts had gone to protest, what, if any, reply did he make?

181 Objected to by plaintiff's attorneys. Objection sustained by the court; to which ruling of the court defendants' attorneys then and there excepted.

Witness continues: Upon receipt of the second letter, stating that the last draft had been protested, I communicated with Mr. Bell.

Defendants' attorney then and there offered to prove by this witness and Mr. Bell that when Mr. Bell was first notified of the protest of the Turner drafts that he at once instructed Mr. Heald that they must not surrender the meats, but that they must be held for the drafts. Also, that the dispatch quoted in the letter of 25th May, "let Alfred Jacks & Co., Liverpool, sell meats for benefit of drafts," was sent in accordance with that conversation and agreement.

Which evidence the court then and there excluded; to which ruling of the court defendant's attorneys then and there duly excepted.

The witness GEORGE D. BOULTON was then recalled by plaintiff, and, in answer to plaintiff's attorney, stated:

182 We gave instructions to our correspondent to prove up those claims under the bankrupt estate on that side.

Credit was allowed, in proving against the Turner estate, for the proceeds of the property sold by Jacks; that is, for the value of the property Jacks got.

Since I was on the stand I have calculated the amount due upon the drafts, after allowing all credits and payment of interest, according to the partial payment system, and make the balance due to be $10,134.90; to this I have added the ten per cent. statutory damage, which I have computed upon the amount appearing upon the drafts, without interest, after deducting the payments made thereon, without interest, and, reduced to dollars, is $802.23.

Cross-examination:

183 To defendants' attorney witness states:

In the statement of account which I made I have credited or allowed as payments the two dividends from Turner's estate, the dividend from Jacks' estate, and $1,000 received from the Canton bank, and the proceeds of 19 boxes of meat, which we recovered from Jacks. Have allowed nothing for the balance of the meats that were in Jacks' hands.

There are four endorsements which I have allowed upon the drafts in my accounting; the first two are dividends from Turner estate, £140 16 1; the next, the dividend from the estate of Jacks, £388 11 9; and the proceeds of the 19 boxes of meat, £66 7 11; amounting together to £595 15 9.

**Burrows M. Saunders**, a witness on behalf of defendants, in answer to defendants' attorney, stated :

That he is an experienced book-keeper. At the last trial of this cause I made a statement from the depositions read in evidence of the sale of meats by Jacks & Co., together with the payment therefor, as appears by their deposition.

In making up that statement the two bills are here charged as of the date they fell due, May 21, 1878, computing the interest
184 thereon to June 21, 1878, which was, at the time of the sale
of the last boxes of meats, of that bill of lading, as I recollect now. The credits on that were the sale of the meats by Jacks, as appears in the deposition, giving a balance to the credit of defendants on those two drafts of £99 4 4.

That balance I carried forward to the other drafts. On that draft interest is calculated from the time it fell due to July 14th, 1879, that being the day when the money was received from the Turner estate, which is credited £140 17 1.

Interest is then calculated to the date the dividend was received from Jacks' estate, and against that I credited sales of meats by Jacks, as they appear by the deposition, from which I deducted the dividends received from the estate of Jacks, and credited the balance, which, on the 7th July, 1880, was £79 9 2. There was at that time no entry of $1,000 upon the drafts. I have now added the $1,000 to the balance, and reduce the balance in pounds, shillings, and pence to currency, and add to that the $1,000 and interest thereon, which makes a total due to defendants of $1,602.55. I have figured the pounds at the same rate Mr. Boulton stated he made his computation.

185 I computed that plaintiff had received for sale of meats 57 pounds; it now appears that they actually received 66 pounds; the difference, reduced to dollars and added to the balance above given, show $1,647.55 as the balance due Humphrey Bell and Co.

These accounts do not show payment of insurance by Jacks. There is no statement in the deposition as to the payment of any.

In answer to the court:

Mr. Bell stated that the meats did not go forward, freights prepaid. The consignee was to pay them, and assumed that Jacks paid them.

The rate of freight is 69 cts. per 100 pounds on 7,900 pounds, 53 cts. on 7,500 pounds, and 69 cts. on 7,800 pounds.

From the exhibits—being account sales—attached to depositions read in evidence, as hereinbefore set forth, it appears that in the month of June, 1878, Alfred Jacks & Co. sold 263 boxes of the meats and received therefore during said month of June the sum of £1,757 9 4, which is three boxes more than the amount embraced in the two bills of lading attached to the first two drafts in question;
that he also sold 49 boxes and received therefore the sum
186 of £456 12 1 in the month of July, 1878; that he sold 31
boxes more for the sum of £221 7 and received his pay therefor during the month of August, 1878.

These several sums reduced to dollars at the same rate of computation as used by Mr. Bolton as to the drafts, show that Jacks received in the month of June, 1878, on sale of the meats in question $8,550.08; in the month of July, 1878, $2,221.38, and in the month of August, 1878, $1,076.87, making a total of $11,848.33.

Which was all the testimony offered by either of the parties upon the trial of said cause.

Thereupon defendants' attorneys moved and requested the court to instruct the jury upon each and every of the following points as follows, viz:

First. That if they believe, from the evidence, and under the instructions of the court, that the First National Bank of Canton, Illinois, would not be entitled to recover a judgment against the defendants, A. J. Whitnah and H. A. Whitnah, if it were plaintiff in this case, that then your verdict in this case should be in favor of said defendants, A. J. and H. A. Whitnah.

Second. That if they believe, from the evidence, that by
187 reason of the fault, neglect, and omissions of the City Bank
of London, or the First National Bank of Chicago, the meats described in the bills of lading accompanying the drafts sued on, or any part thereof, or the proceeds of sales of such meats, or any part thereof, was lost to the defendants in this case on account of such fault, neglect, or omission, that then the value of the meats so lost, or the amount of such proceeds so lost, or both, as the case may be, must be allowed to the defendants and deducted from the amount of said drafts.

Third. That if they believe, from the evidence, that any sums have been paid or received on account of said drafts by either of said banks, that the amount thereof must be allowed and deducted from the amount of said drafts.

Fourth. That if they believe, from the evidence, and under the instructions of the court, that any sums paid or received on account of said drafts, as aforesaid, if any, together with the amount, if any, lost to said defendants of said meats, or proceeds thereof, in the manner or for the reason aforesaid, amount to more than the amount due upon said drafts, then under the pleadings in this case your verdict will be in favor of defendants and against the plaintiff for such excess.

Fifth. That if they believe, from the evidence, that the
188 plaintiff holds the bills of exchange sued on in this case
only under and by virtue of the endorsement thereon by the cashier of the First National Bank of Canton, by C. T. Heald, cashier, and that the items and provisions of such endorsement were not changed or varied by the papers accompanying or the letters transmitting said bills of exchange from said Canton Bank to said plaintiff, nor by other facts pertaining to the payment of money, and also that there has been no subsequent agreement between the parties to this case changing such endorsement, that then any defence which could be legally made by the defendants, the Messrs. Whitnah, if the said Canton Bank was plaintiff in this suit, may

be made against the claim of the plaintiff in this suit, The First National Bank of Chicago.

Sixth. That the bills of exchange sued on in this case are what are known to the law as foreign bills; that upon such bills three days, called days of grace, are allowed by law after the day on which they become due or mature; that such a bill does not become due, in fact or in law, on the day mentioned on its face, but on the last day of grace (1 Peters, 31); that unless such bills are duly protested on the last day of grace (or on the second day, if the 189 last day be Sunday), such protest is not duly made, and the drawers and endorsers are thereby discharged from liability upon such bills.

Seventh. That if the jury believe from the evidence, and under the instructions of the court, that the bills of exchange sued upon in this case were not protested upon the last day of grace (or upon the preceding day if the last day fell on a Sunday), then the verdict of the jury must be for the defendants.

Eighth. That brokers are "those who are engaged for others in the negotiation of contracts relative to property, with the custody of which they have no concern."

Provision brokers, or merchandise brokers, are "those who negotiate the sale of merchandise (or provisions), without having possession or control of it, as factors have." If, therefore, the jury believe from the evidence, and under the instructions of the court, that the plaintiff or the City Bank of London was authorized or instructed by the defendants to employ Alfred Jacks as broker only, and that without the authority or instructions of defendants, said plaintiff or said City Bank of London turned over the meats in question, and the control and possession thereof to said Jacks, with the power and authority to sell the same, and to collect and receive the pro- 190 ceeds of such sales for account of said City Bank of London, and that there was any loss thereby which could not or would not have occurred if said Jacks had been employed as a broker only, then such loss is not the loss of defendants in this case, and the jury in determining upon their verdict will allow the defendants the amount of such loss, if any, as they believe from the evidence was thus sustained.

Ninth. If the jury believe from the evidence that the plaintiff or the City Bank of London violated instructions of the defendants, or either of them, as to the control, custody, and sale of the meats in question, and that thereby a loss was incurred, that then the defendants should be allowed the amount which the evidence shows such loss to have been.

Tenth. That if they believe from the evidence, and under the instructions of the court, that the First National Bank of Canton, Illinois, would not be entitled to recover a judgment against the defendants if it were plaintiff in this case, that then their verdict in this case will be for the defendants.

Eleventh. That under the pleadings and proof in this case the jury cannot allow the ten per cent. statutory damages claimed by the plaintiff.

191 Which request and motion of defendants' attorneys was denied by the court, and the court refused to instruct the jury upon any or either of the points, as above requested; to which ruling of the court, as to each and every of said instructions severally, and refusing to give the same, defendants, by their attorneys, then and there duly excepted.

Thereupon the court charged the jury that the plaintiff was entitled to a verdict in the cause, and directed them to render a verdict for the plaintiff for the sum of ten thousand nine hundred & thirty-seven dollars and thirteen cents damages, being the amount shown due by the testimony of the witness Boulton, including ten per cent. statutory damages, which was done accordingly; to which ruling and direction of the court defendants' attorneys then and there duly excepted, which charge of the court was as follows:

192 "A."

### *Charge to the Jury.*

First National Bank of Chicago
*vs.*
Humphrey Bell & Co.

Blodgett, J.:

This is a suit to recover the balance claimed to be due the plaintiff on three foreign bills of exchange all drawn by the firm of Humphery Bell & Co. on W. D. Turner, Jr., of Liverpool, England, payable sixty days after sight, the two first of the bills bearing date March 4, 1878, one being for the sum of eight hundred and the other for eight hundred and fifty pounds sterling, and the last one, bearing date March 11, 1878, being for the sum of eight hundred pounds sterling. All these bills were made payable to the order of the drawers by their firm name, and are endorsed in the firm name. They were protested for non-payment, and the controversy in this case is whether the defendants are liable, as drawers, to the the plaintiff as a *bona fide* holder of these bills.

Several defenses are argued against the plaintiff's right to recover.

First. That the bills were prematurely presented for payment and protested. That is, as I have said, the bills are payable sixty days after sight; they were accepted by Turner, and, by the terms of the acceptance, were made payable, the two first on the twenty-first, and the last on the thirty-first of May, 1878, and are protested for non-payment on the days on which they were respectively made payable.

193 The defendants contend that, as the law allows three days of grace on all bills of this character, they should not have been presented for payment, or payment demanded, until three days after the date named in the acceptance, and that, therefore, the protest is void and inoperative.

Second. That the plaintiff holds these drafts under a special indorsement to collect them for account of the First National Bank of Canton, Illinois, and therefore, subject to any defense the defendants would have against them in a suit by the Canton bank; and that as against the Canton bank the defendants have a defense growing out of an insurance on the part of one of the officers of that bank, by which he guaranteed them against loss.

Third. That each of these drafts was accompanied by a bill of lading of one hundred and twenty boxes of bacon, shipped by defendants from Canton, Illinois, to Liverpool, England, and that these bills of lading went forward with the bills, and as security for their payment, and that the plaintiff and its agent, the City Bank of London, so negligently dealt with the bacon that the proceds thereof, which much exceeded the amount of these bills, were wholly lost to the defendants, which loss they claim to set off or recoup against the amount due on these bills.

As to the first point made, that the bills were prematurely protested, which is equivalent to saying they were never protested at all, this defense raises a question of law upon undisputed facts. The bills each appear on their face to have been accepted by Turner, on whom they were drawn payable, the two first on the twenty-first. and the last on the thirty-first of May, 1878, and were protested for non-payment on that day. There is no proof in the record,
194 nor on the bills, nor has any been offered, tending to show when Turner first saw these drafts; that is, when they were presented to him for acceptance. The law applicable to these bills, giving sixty-three days from the time they were so cited until they were due—that is, sixty days and three days grace—is unquestioned, and admitted to be the law governing the rights of the parties to this paper. This acceptor saw fit to make his acceptance payable on a day certain, and I am of opinion that the court must hold that by the terms of this acceptance he intended to and did make the bills payable without further days of grace on the days named in his acceptance; and, therefore, the bills were properly protested for non-payment on the 21st and 31st days of May. The law requires to fix the liability of the drawer of these bills, that they shall be protested on the day when they are due, and notice of their dishonor given to the other party. The testimony in the case shows, and is undisputed, that notice was given to the Chicago bank, the plaintiff in this case, of the dishonor of these bills by telegraph and by due course of mail, immediately after they were dishonored, and that the officers of the plaintiff transmitted this notice to the First National Bank of Canton, and that the First National Bank of Canton transmitted it to Humphrey Bell, the managing partner of the defendant firm. I must, therefore, hold that these bills were legally and properly protested on the 21st and 31st, and that the proof, without dispute, shows due notice of the dishonor of the bills to defendants so as to fix their liability under the commercial law.

There is a group or series of undisputed facts in this case bearing upon the origin of these bills and the dealings of the respective parties with them and their relation to the bills and their
195 securities. It is conceded that at the time these bills were drawn the defendants, Humphrey Bell, A. J. Whitnah, and H. A. Whitnah, were the copartners, doing business at Canton, Illinois, under the firm name of Humphrey Bell & Co., as packers of

meats for foreign markets, and had been such partners since some time in November, 1877; and that Humphrey Bell was the financial manager and partner of the firm; that the First National Bank of Canton was then doing business at Canton, Illinois, and C. T. Heald was its cashier and the general manager of its affairs; and that the plaintiff was engaged in the banking business in the city of Chicago, and engaged in buying and selling foreign exchange; and that L. J. Gage was its cashier and chief manager. On the 4th of March, 1878, Humphrey Bell & Co. drew the two drafts of eight hundred and fifty and eight hundred pounds sterling, now in suit, and delivered them, indorsed by the firm name of Humphrey Bell & Co., in blank, to Heald, cashier of the Canton bank, together with a bill of lading attached to each draft, showing a shipment of 120 boxes of bacon from Canton to Liverpool. These bills of lading were made to the order of Humphrey Bell & Co., and endorsed by the firm name in blank, and the drafts and the bills of lading were accompanied by letters of hypothecation signed by Humphrey Bell & Co. and directed to the City Bank of London, so much of which is material to the questions to be determined I will read:

"To the Manager of the City Bank of London, England:

Sir: We have this day sold to the First National Bank bill of exchange for eight hundred pounds on W. D. Turner, Jr., against a shipment of 120 boxes of bacon. The agreement with the First National Bank is, if said bill is accepted, and the acceptance is satisfactory to you, the bill of lading is given up to him without prejudice to your claim on us in the event of the bill not being paid at maturity; but if they decline to accept, or if the acceptance
196 is not satisfactory to you, and if the bill is not paid at
maturity, then you are hereby authorized to retain the bill of lading, and at any time at your discretion to place the goods in the hands of your brokers for sale on account of whom it may concern, and apply the proceeds towards the payment of the bill; and, in case of any deficiency, we hereby agree to pay the amount of such deficiency to the First National Bank on demand.

Yours, respectfully, HUMPHREY BELL & CO."

On the 11th of March the firm of Humphrey Bell & Co. drew the last or third draft in question, accompanying the same with a bill of lading for 120 boxes of bacon and letters of hypothecation in the same form as that accompanying the first two drafts. It is conceded the bills of lading represented the meats described in them, and the intention of these two documents was to pledge these meats or their proceeds for the payment of the drafts to which they were respectively attached. These drafts were forwarded by the Canton bank, to whom Humphrey Bell & Co. delivered them to the Chicago bank with an endorsement stamped on them in the following words: "Pay First National Bank of Chicago, for collection and account of First National Bank of Canton, Illinois. C. T. Heald, cashier." The letter from Heald, cashier of the Canton bank, to the Chicago bank, which enclosed these drafts, was partly printed and partly

written; the printed part stating in substance, "we enclose for collection and account," and then following in writing a description of the drafts, and also a direction to place the proceeds to the credit of the Canton bank with the Commercial National Bank of Chicago. The proofs also show, without dispute, that on the receipt of these bills by the Chicago bank the proceeds of their then current
197 rate of exchange were passed to the credit of the Canton bank, in the Commercial National Bank of this city, and that the amount of such proceeds was placed to the credit of Humphrey Bell & Co. by the Canton bank, and all paid out by the *the* Canton bank upon the checks of Humphrey Bell & Co.

The Chicago bank transmitted the bills and the accompanying documents to the City Bank of London, and on the 23d of May the London bank notified the Chicago bank by telegraph that the drafts of March 4 had been dishonored, and on the same day the Chicago bank, by telegraph and letter, notified the Canton bank of the dishonor of these first two drafts. This letter was in the following words:

"CHICAGO, *May* 23, 1878.

CHARLES T. HEALD, *Cashier*, *Canton*, *Ills.*

DEAR SIR: We are advised by cable to-day that the following drafts endorsed by you have gone to protest for non-payment: Humphrey Bell & Co. on W. D. Turner, draft for eight hundred pounds; Humphrey Bell & Co. on W. D. Turner, draft, eight hundred and fifty pounds. Be kind enough to advise us by wire what disposition shall be made of the property. I charge your account for cablegram, which please remit, $4.25.

Yours, respec*tive*ly, GEORGE D. BOLTON."

This letter came duly to hand, and was shown to Mr. Bell, and, under his instructions, a telegram was sent on the 25th of May by Heald to the cashier of the Chicago bank, in the following words: "Request Alfred Jacks to sell goods for benefit of drafts;" and on the same day Heald wrote the Chicago bank as follows:

"CANTON, ILLS., *May* 25, 1878.

FIRST NATIONAL BANK OF CHICAGO:

Your of 23rd received. Upon consultation with drawers of the protested drafts on W. D. Turner, Jr., I have advised you by telegraph, at their request, as follows: 'Request Alfred Jacks to sell goods for benefit of drafts.' Alfred Jacks & Co. have guaranteed
198 to drawers the payment of their drafts on Turner. You will, of course, advise me promptly of any information you may obtain regarding the matter.

Yours, truly, C. T. HEALD."

A similar notice was given by the London bank to the Chicago bank about the 31st of May of the dishonor of the draft of March 11, and notice to the same purport was forwarded by telegraph and letter from the Chicago bank to the Canton bank; and the letter containing this information was shown to Bell, and by his direction the Chicago bank was directed again by telegraph and letter to "request Alfred Jacks to sell goods for the benefit of drafts." On receipt of these directions from the Canton bank and Bell as to the disposition to be made of the property, the Chicago bank, by L. J. Gage, cashier, sent to the City Bank of London a telegram in the following words: "Let Alfred Jacks, Liverpool, sell 7983, 7984, under your control," it being conceded that the numbers in this telegram refer to the two drafts of March 4 and the property accompanying them, and are, in effect, a direction to let Jacks sell the meats under the City Bank's control; that is, the City Bank of London was to retain control of the meats, but to allow Jacks to sell them. A message to the same purport was sent to the City Bank on or about June 3rd in regard to the meats pledged for payment of the third draft.

Acting or assuming to act under these instructions the London bank in the early part of June turned these meats over to the possession of Alfred Jacks as broker to sell. Jacks proceeded to sell the meats, and during the months of June, July, August, and up to the 13th of September, sold all but 17 boxes, for which he received, or should have received, about £2,737 15 5, according to the account taken from his books. On the 13th of September Jacks failed, and his trustee in bankruptcy took possession of his property, and
among other effects were the 17 boxes of bacon remaining
199 unsold, which the trustee sold, and accounted for the proceeds
to the amount of £61 to the City Bank. Jacks, the broker, and Turner, the acceptor of the drafts, were both declared bankrupt, and the plaintiff proved against Jacks' estate for the amount of the meats sold by him, and the amount of the drafts were also proved against the estate of Turner. The dividends realized from these two estates in bankruptcy are endorsed on the drafts, and this suit is for the balance.

It also appears that Jacks made no reports of his sales to the City Bank of London, and made no remittance or payment to the City Bank or any one else interested in the meats on account of these sales; but it does appear that during the months of July and August, and especially in the latter part of August, he was frequently written to or called upon by the City Bank of London to report his sales, which he did not do.

On the 19th of July the Chicago bank called on the Canton bank for payment on these drafts, on the ground that the Canton bank stood between the plaintiff and the drawers of these bills, and was liable to the plaintiff for the amount due thereon, and in that letter stated the meats were in the hands of the brokers named by the Canton bank for sale. To this letter the Canton bank responded, asking if the matter could not be allowed to stand by their making a deposit of sufficient margin, to which the plaintiff assented, and $1,000 was named as a margin, which was forwarded to the plaintiff from the Canton bank, and the proceeds of which have now been indorsed on these drafts. It also appears that the City bank of London notified the Chicago bank, soon after the receipt of

instructions, to let Jacks sell; that the meats had been delivered to Jacks for sale; so that we may assume it as a settled or proven fact in the case that the Chicago bank did know from about the 8th of June that the meats had been actually delivered
200 over to Jacks and into his possession. But it also appears that the Canton bank and Humphrey Bell & Co. did not know until about September 13th, and until after Jacks' failure, that the London bank had parted with the possession of the meats. On the 20th of September the Chicago bank, by a letter to Heald, cashier, demanded payment of these drafts from the Canton bank. This was followed by several other letters between the Chicago bank and the Canton bank, in which, finally, suit was threatened unless settlement was made, and this resulted in a proposition from the Canton bank to the Chicago bank that the latter should sue the defendants, Humphrey Bell & Co., as drawers of these bills, instead of bringing suit against the Canton bank, and an agreement in writing was finally made by which the plaintiff in this suit was to sue Humphrey Bell & Company on these drafts, and the Canton bank agreed to pay half of the expenses of such suit and buy the judgment as soon as rendered. So far the facts may be said to be undisputed—that is, they are proven and not denied by either side. They are established mainly by the correspondence between the parties, and may be considered as undisputed facts.

The plaintiff has also, against the objection of the defendant, been allowed to give proof tending to show that the Chicago bank bought these drafts for their full commercial value, and did not take them for collection on account of the Canton bank, and that this purchase was made in pursuance of an arrangement or understanding which had been had at some previous time between the Chicago bank and Humphrey Bell & Co., or some person who made application in their behalf, by which the Chicago bank was requested to purchase the foreign exchange of Humphrey Bell & Co., and they agreed to do so, provided it should have the endorsement of the country
201 banker of Humphrey Bell & Co., and that in pursuance of this arrangement the Chicago bank had, on several occasions, prior to the drafts in question, cashed the drafts of Humphrey Bell & Co. with the endorsement of the Canton bank upon them in the same manner the drafts in question were cashed.

It has been objected that the court, by allowing this proof, has allowed parol evidence to change the terms of the written endorsement under which the plaintiff bank holds these drafts from the Canton bank. After careful consideration of the authorities I have come to the conclusion that this is allowable, and that as between the plaintiff and the defendants in this case *suit*, it does not lie in the mouth of these defendants to question the relation which existed between the two banks, but that the drafts are to be considered as properly transferred to the plaintiff and to protect it as a *bona fide* holder against Humphrey Bell & Co. It being assumed, because it is undisputed, that the plaintiff has bought and paid value for them in due course of business.

The defendants have also offered proof tending to show that, prior to the formation of the firm of Humphrey Bell & Co., a conversation took place between Mr. Heald, the cashier of the Canton bank, and the two Mr. Whitnahs, in which, after explaining the manner drafts were drawn and secured by the property shipped, Mr. Heald stated if they went into partnership with Bell, and he, Heald, should be allowed to do the business of the firm as he had in the past, that he would guarantee the Whitnahs against loss; and it is contended upon this proof that the plaintiff cannot recover in this suit as against the Whitnahs, because it is urged the plaintiff stands in the shoes or in the place of the Canton bank; and if the Canton bank could not recover against the Whitnahs, the present plaintiff cannot do so.

202 I have recapitulated the facts bearing upon the case so far as they are undisputed. The law upon these facts, as I shall apply it, is this: By the letters of hypothecation the City Bank of London became the agent of Humphrey Bell & Co. to collect these drafts when it became necessary to apply the proceeds of the meats to the payment of the drafts. The City Bank of London, by these letters of hypothecation attached to each of these drafts, is not made the agent of the plaintiff in this case, but is made the agent of the defendants, Humphrey Bell & Company, to sell their meats and pay their debts from the proceeds, and the only question that is left to be discussed is, whether the telegram transmitted to the City Bank of London directing that Alfred Jacks be requested to sell the goods for benefit of drafts changes the terms of the agency of the City Bank of London, and makes the City Bank of London the agent of the plaintiff only.

By the letter of hypothecation the City Bank of London, in my estimation, was clothed with ample discretion to place these goods in the hands of any broker in case of non-payment of the drafts. They had the right to select their own broker. The only effect of the dispatch, so far as it came from the Canton bank to the Chicago bank, was to designate the broker into whose hands the goods were to go. It left the powers of the City Bank of London entirely unchanged, except that it designated who the defendant wished to have take charge of selling the meat. The City Bank of London still remained the agent of Humphrey Bell & Co., with authority to act in the premises with the same power that they had before, except that a broker was named or designated. Mr. Gage, in transmitting this order from himself through to the City Bank of London, adds the words, "under your control." The direction from Gage to the City Bank of London was: "Let Alfred Jacks sell 7883–7984 (meaning the meats) under your control." Was this a
203 change of the responsibility of the City Bank of London so that they became, under that authority, the agents of the Chicago bank, and did the City Bank of London cease from that time forward to be the agents of Humphrey Bell & Co.? That is the question. I have come to the conclusion that they did not, that they still remained the agents of Humphrey Bell & Co., and still were acting under the letter of hypothecation by which they had first been clothed with power to deal with and handle these meats.

It is conceded that the relations of these parties to these meats were these: Humphrey Bell & Co. were the owners; the Chicago bank had advanced money upon them to the amount of these drafts at the fair commercial rate of foreign exchange, and had a lien on the meats for these advances. The meats were pledged for the payment of the drafts. If the meats were lost by any act not the act of the Chicago bank, it was the loss of the defendants, and their liability on the drafts was not released. Now, what has the Chicago bank done which can release Humphrey Bell & Co. from their liability to the plaintiff on these drafts? The only thing it did do was to add the words, "under your control," to the despatch which came from Canton to Chicago. Is that so far a change as to affect the rights of the plaintiff against the defendants, and make the plaintiff liable for any negligence of the City Bank of London? I conclude that it does not, because at most it is a restriction. If Mr. Gage had repeated to the City Bank of London precisely the language which he received from Mr. Heald, he would have said to them, "request Alfred Jacks to sell goods for benefit of drafts." That, as I have said, would be only the designation of a broker, because an agent acting upon a suggestion from a principal as to what other agent he shall employ does not change the terms of the agency in any other particular. So I conclude Alfred Jacks was the agent designated by the defendant, and that designation was accepted by 204 the City Bank of London, and that the words, "under your control," are the only words for which the plaintiff is responsible, and those words do not change the duties or liabilities of the City Bank of London. They only directed or requested the City Bank to retain control of the meats.

In this connection I may be allowed to say that the defendants offered to introduce proof tending to show that Mr. Bell and Mr. Heald, at the time the despatch of May 25th was sent, understood that those words used would in and of themselves necessarily imply that the City bank should keep control of the property; that they talked during the time that they were discussing the form in which the dispatch should be sent in regard to the disposition of the property, about what *what* would be the effect of the language used, and concluded that the effect of sending such a dispatch would be to require the City Bank of London to retain possession of the meats; that the bank would not, under such instructions, give up the property until the drafts were paid. I excluded that testimony, because I thought, inasmuch as there were no cipher terms used in the dispatch, the parties must stand on the natural meaning of the words as they were transmitted, and, therefore, testimony as to the meaning defendants themselves put upon it was excluded, to-; that Mr. Gage, as I apprehended, is responsible for adding the words "under your control," and the effect of adding those words, in my estimation, was simply to admonish the City bank to do what the defendants and the Canton bank had not admonished them to do, that is, retain control of the meat.

The Chicago bank was known by the City Bank of London to be the holder of these drafts. They had been sent forward to the

City Bank of London by the Chicago bank. The only question 205 is was there such a modification or assumption of authority or control over the City Bank of London, acting under these letters of hypothecation, as to make whatever the City Bank of London should do, after receipt of Gage's telegram with reference to the sale of the meat, the act of the plaintiff; and, as I have already said, I do not think it could, because the language, at most, was a limitation, where the defendants had given full authority.

It follows, then, from this statement, that when the City Bank of London placed these meats in the hands of Alfred Jacks they did it as the agents of the defendants in this suit, Humphrey Bell & Co., under the authority with which they were clothed. By the letters of hypothecation the City bank was authorized to sell the meats in case of non-payment of the drafts through brokers of its own selection; instead of selecting the broker, defendants were allowed to select or name him. The plaintiff in this suit is not responsible for the neglect, if there was any, on the part of the City bank in turning these meats over to the possession of defendants' broker.

The failure of Jacks, the misappropriation of the proceeds by him, is the act of the defendants' own agent, selected by themselves, and not the act of the agent selected by the plaintiff, and, therefore, the plaintiff is not responsible for the loss of the proceeds of the bacon.

I come back, then, for a moment to the other branch of the case, and that is the testimony bearing upon the understanding of the Whitnahs as to the degree of responsibility which they assumed in entering on this business. It must be remembered that Humphrey Bell & Co. had been for several years prior to the formation of this firm engaged in packing meats for foreign markets, shipping 206 them abroad and drawing bills against them; that his former partner had died, and he, not being understood to be responsible himself, had sought other partners. He had, in some form, made application to the two defendants Whitnah, they being acquainted with Mr. Heald, the cashier of the Canton bank. The younger man called on Mr. Heald and asked for some information as to the manner in which the business was transacted. Mr. Heald gave the information, and stated if he could be allowed to do the business for the new firm, if they proposed to go into one, as he had for the old firm, he would guarantee them against loss. That is the testimony of young Mr. Whitnah. The same day, probably, or shortly afterwards, his father and himself waited on Mr. Heald and had a similar conversation. Now, assuming these statement- to be true, and we must assume they are true for the purpose of this case, although Mr. Heald, while he admits having a conversation, denies that he gave the assurance there would be no loss if he were allowed to manage the business. But assuming the statement of the Whitnahs to be true, does that furnish any defense against these drafts in the hands of the present plaintiff? There is no evidence bringing home this conversation to the plaintiff. There is evidence in this case that, when the firm was formed, there was some provision in the articles of copartnership that no money should be borrowed except on individual signatures of the partners. This provision in the articles of copartnership and this conversation with Heald is not brought by the proof to the knowledge of the plaintiff, but it is claimed the plaintiff stands charged with knowledge of this by imputation; that is, that holding this paper by an indorsement "for collection on account of the Canton bank," the plaintiff stands in the shoes of the Canton bank, and is chargeable with whatever equities the defendant may have against the Canton bank. I have already partially disposed of this by the conclusion that the relations 207 between the Canton bank and the plaintiff's bank can be explained by parol; and although apparently their relations are that of one being collector for the other, yet the parol evidence without dispute shows that this was really a discount of these drafts by the Chicago bank, and the proceeds at once passed to the credit of the Canton bank, and were received and used by the defendants; that from the nature of the transaction it could not have been intended as a collection, because the drafts were drawn on a man in Liverpool payable sixty days after sight, and it was undoubtedly expected that the drafts would be paid out of the proceeds of the sale of the meats which accompanied the drafts. The plaintiff cashed the drafts at once on their arrival at Chicago, and the defendants received the proceeds long before the drafts had even reached Liverpool or been presented for acceptance.

Disposing of this branch of the question in that way substantially disposes of so much of the testimony as attempts to connect by imputation the defendant with the plaintiff by the relation between themselves and Mr. Heald. But, to go still further: Suppose that this suit was brought by the Canton bank against the firm of Humphrey Bell & Co., would what has been offered in evidence here by the defendants then be a defense? It is that Mr. Heald, before the firm of Humphrey Bell & Co. was formed, in a casual conversation, guaranteed the two Whitnahs against loss on drafts and shipments of property if they would allow him to manage the business. It cannot be supposed this binds the Canton bank. It was at most a mere voluntary statement of one individual to another. The stockholders and officers of the Canton bank could not be held responsible for the guarantee by their cashier of the contracts, undertakings, and miscarriages of this firm in the future by a mere statement 208 of this kind, made really without any consideration, except they would allow him to manage the business. It was not such an undertaking as was within the scope of Mr. Heald's employment by his bank. So that, assuming all this testimony was in and considered, I am of opinion it does not make a defense; that the mistakes, if any were made, by the City Bank of London in not demanding, from week to week or month to month, accounts from Jacks of his sales and payment of the proceeds over to them, are mistakes of the defendants' own agent, and not mistakes of the plaintiff's agent, assuming that it was so. Assuming, for the purpose of this case, Mr. Heald did say what is claimed to Whitnahs, it would not be a defense against the Canton bank in case suit was brought directly by the Canton bank on this paper of Humphrey

Bell & Co., unless they show some direct mismanagement on the part of the Canton bank.

With this view of the legal effect of the undisputed facts and of the immateriality of the controverted questions, I think there can be no doubt of the plaintiff's right to a verdict, and accordingly direct you to return a verdict for the plaintiff for the amount unpaid on the drafts, with interest at 6 per cent., and the statutory damages, making in all the sum of $10,937.13.

Endorsed: Filed April 5, 1882. Wm. H. Bradley, clerk.

(For exception to above, see page 191.)

Thereupon defendants, by their attorneys, move the court for a new trial in this cause, and made and filed said motion in said court in said cause in writing as follows, viz:

And now come the said defendants, by Hoyne, Horton and Hoyne, their attorneys, and move the court to set aside the finding in
209 said cause and for a new trial, because—

1st. The court admitted improper evidence in behalf of the said plaintiff against the objections of the defendants.

2nd. The court excluded proper evidence offered in behalf of the said defendants.

3rd. The court erred in entering the finding as the verdict, or finding of the jury.

4th. The court erred in allowing to the plaintiff the ten per cent. statutory damages upon foreign bills of exchange, as claimed by the plaintiff.

5th. The court erred in taking the cause from the jury, and deciding the same without submitting the same to the jury.

6th. The court erred in not submitting to the jury the contested question of fact in said cause, and in refusing to allow the jury to find a verdict.

7th. The finding is contrary to the law and the evidence of the case.

8th. The court erred in refusing the prayers of the defendants for instructions, and each and every such prayer, the said prayers being as follows, to wit, (being the same instructions asked by defendants' attorneys, and set forth above.)

9th. The court erred in deciding that there were no questions of facts in said cause, and erred in refusing to submit to the jury the following questions of facts, among others, to wit:

1st. Whether or not the transfer of the drafts sued upon
210 in said cause was for discount or sale, or for collection?

2nd. Whether the City Bank of London was the agent of the plaintiff, or of the defendants, in the disposal of the property pledged?

3rd. Whether the property pledged was held and disposed of by the City Bank of London under the hypothecation paper, or under the instructions in the telegrams and cablegrams and letters?

4th. Whether or not there was intended by the defendants to be any change in the agency by the cablegrams, telegrams, and letters, which was so understood by the plaintiff and the City Bank of London?

5th. Whether or not the City Bank of London and the plaintiff waived the authority in the hypothecation papers by asking for instructions from the defendants?

6th. Whether or not the instructions sent by the defendants were understood by the plaintiff and the City Bank of London as a charge of the original authority contained in the hypothecation papers?

7th. Whether or not under the hypothecation papers there was any right in the City Bank of London to deliver up the property?

8th. Whether or not there was such gross negligence as to release said defendants?

9th. Whether or not from the testimony it would appear that after
the instrctions called for by the plaintiff the plaintiff assumed
211 control of the property, and by such assumption charged
itself with the duty of seeing to the disposition of the
property?

10th. Whether or not the plaintiff converted the property to its own use?

11th. Whether or not the plaintiff placed the property beyond the control of the defendants?

12th. Whether or not the defendants, Andrew J. Whitnah and Hiram A. Whitnah, were guaranted against loss by the First National Bank of Canton, or Charles T. Heald, its cashier?

13th. Whether or not there was neglect in leaving the proceeds of the property in the hands of the broker for a period of several months without investigation, or effort to obtain the same by the City Bank of London?

14th. Whether or not the money arising from the disposal of the property was not received by the City Bank of London on behalf of the plaintiff?

15th. Whether or not the drafts sued on were paid?

10th. The court erred in deciding that the City Bank of London was the agent of the defendants against their denial.

11th. The court erred in deciding that the bills of exchange sued upon were properly protested.

12th. The court erred in not submitting to the jury the question
of fact whether or not days of grace had been allowed on
212 said bills of exchange before the protest thereof.

Which motion for a new trial was overruled by the court, and judgment entered upon the verdict rendered as aforesaid; to which ruling of the court, in overruling said motion for a new trial, and in entering judgment as aforesaid, defendants, by their attorneys, then and there duly excepted.

Whereupon, and upon the entry of such judgment, defendants, by their attorneys, moved the court for a writ of error in said cause, to the Supreme Court of the United States, which motion is granted by the court upon defendants filing a bond in said cause, to be approved by the court in the penal sum of fifteen thousand dollars, which bond is filed herein, duly approved by the court.

And inasmuch as the matters aforesaid do not appear of record, counsel for the defendants present this their bill of exceptions, and pray that the same may be signed and sealed by the court, and made a part of the record in this cause; and it is done accordingly.

H. W. BLODGETT, *Judge*. [SEAL.]

(Endorsed:) Filed April 5, 1882. Wm. H. Bradley, clerk.

213 NORTHERN DISTRCT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the record of all the proceedings had in said court in said entitled cause, wherein said First National Bank of Chicago is the plaintiff and Humphrey Bell *et al.* are the defendants, as the same appear from the files and records of said court now remaining in my possession and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this 14th day of September, A. D. 1882.

[SEAL.] WM. H. BRADLEY, *Clerk*.

214 UNITED STATES OF AMERICA,
*Northern District of Illinois*, } *ss:*

The United States of America, to the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court, between The First National Bank of Chicago, plaintiff, and Humphrey Bell, Hiram A. Whitnah, and Andrew J. Whitnah, defendants, in an action of assumpsit, a manifest error hath happened, to the great damage of the said Humphrey Bell, Hiram A. Whitnah, and Andrew J. Whitnah, as by their complaint appears, and it being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1882, in the Supreme Court, to be then and there held; that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-first day of April, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the 106th year.

[SEAL.] WM. H. BRADLEY,
*Clerk U. S. Circuit Court Nor. Dist. Ill.*

[Endorsed:] Supreme Court of the United States. Humphrey Bell, *et al.*, plaintiff in error, *vs.* The First National Bank of Chicago, defendant in error. Writ of error.

215 UNITED STATES OF AMERICA, } *ss:*
*Northern District of Illinois,* }

To The First National Bank of Chicago, plaintiff, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, A. D. 1882, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein The First National Bank of Chicago is the plaintiff and Humphrey Bell, Hiram A. Whitnah, and Andrew J. Whitnah are the defendants, to show cause, if any there be, why the error in said writ mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry W. Blodgett, district judge, this 24th day of April, in the year of our Lord one thousand eight hundred and eighty-two.

H. W. BLODGETT, *Judge.*

Copy rec'd 5–3–'82.

DUPEE & JUDAH,
*Att'ys for 1st Nat. B'k.*

[Endorsed:] Supreme Court of the United States. Humphrey Bell *et al.*, plaintiff in error, *vs.* The First National Bank of Chicago, def't in error. Citation to October term, A. D. 1882.

216 *Assignment of Errors.*

UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States, to the October Term, A. D. 1882.

HUMPHREY BELL, ANDREW J. WHITNAH, and HIRAM A. WHITNAH, Plaintiffs in Error,
*vs.*
THE FIRST NATIONAL BANK OF CHICAGO, Defendant in Error.

And now come Humphrey Bell, Andrew J. Whitnah, and Hiram A. Whitnah, the plaintiffs in error, by Hoyne, Horton and Hoyne, their attorneys, and Thomas Hoyne, their counsel, and say that in the record and proceedings aforesaid there is manifest error in this, to wit:

First. The court erred in admitting improper evidence offered by plaintiff against the objections and exceptions of the defendants.
217 For the particulars thereof the plaintiffs in error refer to pages 101, 102, 103, 104, 105, 114, 115, 116, 129, and 131 of record.

Second. The court erred in excluding proper evidence offered by defendants. For particulars thereof plaintiffs in error refer to pages 174, 176, 177, 180, 181 of record.

Third. The court erred in entering the finding as the finding or verdict of the jury.

Fourth. The court erred in directing a verdict for the plaintiff. (See page 85 of record.)

Fifth. The court erred in overruling the motion for new trial asked for by defendants. (See page 95 of record.)

Sixth. The court erred in overruling motion by defendants to strike out testimony which had been improperly admitted against the objection and exception of the defendants, and for particulars the defendants in error refer to pages 110 and 133 of record.

Seventh. The court erred in refusing the prayers of the
218 defendants for instructions, and each and every such prayer,
the said prayers being as follows, to wit:

A. That if the jury believe from the evidence, and under the instructions of the court, that if the First National Bank of Canton, Illinois, would not be entitled to recover a judgment against the defendants Whitnah, if it were plaintiff in this case, that then their verdict should be in favor of the defendants Whitnah.

B. That if they believe from the evidence that by reason of the fault, neglect, and omission of the City Bank of London, or the First National Bank of Chicago, the meats described in the bills of lading accompanying the draft sued on, or any part thereof, or the proceeds of sales of such meats, or any part thereof, were lost to the defendants in this case on account of such fault, neglect, or omission, that then the value of the meats so lost, or the amount of such
proceeds so lost, or both, as the case may be, must be allowed
219 to the defendants and deducted from the amount of said
drafts.

C. That if they believe from the evidence that any sums have been paid or received on account of said drafts by either of said banks, that the amount thereof must be allowed and deducted from the amount of said drafts.

D. That if they believe from the evidence, and under the instructions of the court, that any sums paid or received on account of said drafts as aforesaid, if any, together with the amount, if any, lost to said defendants of said meats, or proceeds thereof, in the manner or for the reason aforesaid, amounted to more than the amount due upon said drafts, then, under the pleadings in the case, the verdict will be in favor of the defendants and against the plaintiff for such excess.

E. If they believe from the evidence that the plaintiff holds the
bills of exchange sued on in this case only under and by
220 virtue of the endorsements thereon by the cashier of the First
Bank of Canton, and that the terms and provisions in said
endorsements were not changed or varied by the papers accompanying or the letters transmitting said bills of exchange from said Canton Bank to said plaintiff, nor by other facts pertaining to the payment of money, and also that there has been no subsequent agreement between the parties to this case changing such endorsement, that then

any defense which could be legally made by the defendants, the Messrs. Whitnah, if the said Canton Bank was plaintiff in this suit, may, under the pleadings in this case, be made against the claim of the plaintiff in this suit, the First National Bank of Chicago.

221 F. That the bills of exchange sued on in this case are what are known to the law as foreign bills; that upon such bills three days, called days of grace, are allowed by the law after the day on which they become due or mature; that such bills do not become due, in fact or in law, on the day mentioned on their face, but on the last day of grace; that unless such bills are duly protested on the last day of grace, or on the second day, if the last day be Sunday, such protest is not duly made, and the drawer and endorsers are thereby discharged from liability upon such bills.

G. That if the jury believe from the evidence, and under the instructions of the court, that the bills of exchange sued upon in this case were not protested upon the last day of grace, or the preceding day, if the last day fell upon Sunday, then the verdict of the
222 jury must be for the defendants.

H. That brokers are those who are engaged for others in the negotiation of contracts relative to property, with the custody of which they have no concern. Provision brokers or merchandise brokers are those who negotiate for the sale of merchandise or provisions without having possession or control of the goods as factors have. If, therefore, the jury believe, from the evidence and under the instructions of the court, that the plaintiff or the City Bank of London was authorized or instructed by the defendants to employ Alfred Jacks as broker only, and that, without the authority or instructions of defendants, said plaintiff or said City Bank of London turned over the meats in question and the control and possession thereof to said Jacks, with the power and authority to sell the
223 same, and to collect and receive the proceeds of said sales for
and on account of said City Bank of London, and there was any loss thereby, which could not or would not have occurred if said Jacks had been employed as a broker only, then such loss is not the loss of defendants in this case, and the jury in determining upon their verdict will allow the defendants the amount of such loss, if any, as they believe from the evidence was thus sustained.

J. If the jury believe from the evidence that the plaintiff or the City Bank of London violated the instructions of the defendants, or either of them, as to the control, custody, and sale of the meats in question, and that thereby a loss was incurred, that then the defendants should be allowed the amount which the evidence shows such loss to have been.

K. That if they believe from the evidence, and under the
224 instructions of the court, that the First National Bank of Can-
ton, Illinois, would not be entitled to recover judgment against the defendants, if it were plaintiff in this case, that then their verdict in this case will be for the defendants.

L. That, under the pleadings and proof in this case, the jury cannot allow the ten per cent. statutory damages claimed by the plaintiff.

Eighth. The court erred in its instructions to the jury. (See page 192 of record.)

Ninth. The court erred in directing the jury to find a verdict for a specific amount. (See pages 191 and 208 of record.)

Tenth. The court erred in directing the jury to include in its verdict statutory damages. (See pages 191 and 208 of record.)

Eleventh. The court erred in not permitting the jury to consider
the evidence and return such a verdict as they should find
225 was proper from the evidence.

Twelfth. The court erred in holding and instructing the jury that there were no questions of fact in said cause, and erred in refusing to submit to the jury the following questions of fact, among others, to wit:

A. Whether or not the transfer of the draft sued on in said cause was for discount or sale or for collection.

B. Whether said City Bank of London was the agent of the plaintiff or of the defendants in disposing of the property pledged.

C. Whether the property pledged was held and disposed of by the said City Bank of London under the hypothecation paper or under the instructions in the cablegrams, telegrams, and letters.

D. Whether or not there was intended by the defendants to be
any change in the agency by the cablegrams, telegrams, and
226 letters, which was so understood by the plaintiff and the City
Bank of London.

E. Whether or not the City Bank of London and the plaintiff waived the authority in the hypothecation papers by asking for instructions from the defendants.

F. Whether or not the instructions sent by the defendants were understood by the plaintiff and the City Bank of London as a change in the original authority contained in the hypothecation papers.

G. Whether or not, under the hypothecation papers, there was any right in the City Bank of London to deliver up the property.

H. Whether or not, from the testimony, it would appear that under the instructions called for by the plaintiff, the plaintiff
assumed control of the property, and by such assumption
227 charged itself with the duty of seeing to the disposition of
the property.

K. Whether or not the plaintiff converted the property to its own use.

L. Whether or not the plaintiff placed the property beyond the control of the defendants.

M. Whether or not the defendants, Andrew J. Whitnah and Hiram A. Whitnah, were guaranteed against loss by the First National Bank of Canton, or Charles T. Heald, its cashier.

N. Whether or not there was negligence in leaving the proceeds of the property in the hands of the broker for a period of several months without investigation or effort to obtain said proceeds by the City Bank of London.

O. Whether or not the money arising from the disposition of the property was not received by the City Bank of London on behalf of the plaintiff.

228 P. Whether or not the drafts sued on were paid.

Thirteenth. The court erred in holding and instructing the jury that the City Bank of London was the agent of the defendants.

Fourteenth. The court erred in entering judgment on the finding ordered by the court. (See page 95 of record.)

Fifteenth. The court erred in not submitting to the jury the question of fact whether or not the days of grace had been allowed on said bills of exchange before the protest thereof.

Sixteenth. The finding and direction of the court is contrary to the law and the evidence.

By reason whereof said plaintiffs in error pray that said judgment may be reversed.

HUMPHREY BELL,
HIRAM A. WHITNAH, AND
ANDREW J. WHITNAH,
*Pl'ffs in Error,*
By HOYNE, HORTON & HOYNE.

THOMAS HOYNE, *Counsel.*

Endorsed on cover: N. Illinois C. C. U. S. No. 294. Humphrey Bell, Hiram A. Whitnah, and Andrew J. Whitnah, plaintiffs in error, *vs.* The First National Bank of Chicago. Filed 4th October, 1882.

Office Supreme Court U. S.
FILED.
JAN 27 1885
JAMES H. McKENNEY.
CLERK.

115-373

IN THE

# Supreme Court of the United States,

OCTOBER TERM, A. D. 1884.

| | |
|---|---|
| HUMPHREY BELL, ANDREW J. WHITNAH AND HIRAM A. WHITNAH, *Plaintiffs in Error,*<br>*vs.*<br>THE FIRST NATIONAL BANK OF CHICAGO, *Defendant in Error.* | Error to the Circuit Court of the United States for the Northern District of Illinois. |

## BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

O. H. HORTON,
HORTON, HOYNE & SAUNDERS,
ATTORNEYS FOR PLAINTIFFS IN ERROR.

O. H. HORTON,
Of Counsel.

BARNARD & GUNTHORP, LEGAL PRINTERS. 104 RANDOLPH STREET, CHICAGO.

IN THE

# Supreme Court of the United States,

OCTOBER TERM, A. D. 1884.

HUMPHREY BELL, ANDREW J. WHITNAH AND HIRAM A. WHITNAH,
*Plaintiffs in Error*,
*vs.*
THE FIRST NATIONAL BANK OF CHICAGO,
*Defendant in Error*.

**Error to the Circuit Court of the United States for the Northern District of Illinois.**

## Brief and Argument for Plaintiffs in Error.

MAY IT PLEASE THE COURT:

As this case was taken from the jury, and as all the questions involved were passed upon by the court below, a proper presentation of the case in this court requires a full

## STATEMENT OF FACTS.

For some time prior to September, 1877, Humphrey Bell, one of the plaintiffs in error, had been engaged with a Mr. Ingersoll, at Canton, Illinois, in the business of packing meats for the foreign market, under the firm name of Ingersoll & Bell. In September, 1877, Mr. Ingersoll died.

Thereupon, and in November following, and upon consultations with C. T. Heald, cashier of the First National Bank of Canton, Mr. Bell, at the suggestion of Mr. Heald, applied to the Messrs. Whitnah, father and son, two of the plaintiffs in error, who were farmers in the vicinity of Canton, to enter into partnership with him, and continue the business which had been conducted by Ingersoll & Bell. Mr. Bell stated to Whitnah, Jr., that Mr. Heald desired to see him in regard to the matter of forming such partnership. Whitnah, Jr., first went alone in answer to this request to Mr. Heald's bank, and afterward he and his father went together to the same place and saw Heald. At both of these interviews it was stated by Whitnah to Heald, in substance, that they, the Whitnahs, knew nothing about the business, and that the meat might be shipped out of the country, and they thereby lose it, or the proceeds thereof. To this Heald replied in substance, that the bills of lading were attached to the foreign bills of exchange, and the goods were held for their payment, and that if they should go in with Bell and the business be entrusted to him (Heald), or to his bank, as it had been before Ingersoll died, that he would guarantee that there would be no trouble about it. Thereupon the partnership between plaintiffs in error was formed under the firm name of Humphrey Bell & Co. After this partnership was formed, Mr. Whitnah informed Mr. Heald of the fact that it was provided in their partnership articles, that when there was any considerable amount of money at stake, any papers in regard to same must be signed by the members of the firm in their individual names. Money was then obtained of Heald's bank, the members of the firm signing therefor their individual names, as provided by their partnership articles.

In March following Bell drew the three foreign bills of exchange sued on and signed thereto the firm name. One of these foreign bills, with the acceptance thereof by the drawer, and the endorsements thereon, is as follows, viz.:

£850. CANTON, Ill., March 4, 1878.

Sixty days after sight of this first of exchange (the second and third unpaid) pay to the order of ourselves, in London, eight hundred and fifty pounds sterling, value received, and charge to the account of

HUMPHREY BELL & CO.

*To W. D. Turner, Jun., Liverpool.*

Written across the face of this bill are the following words, to wit:

Accepted, payable at Messrs. Barclay & Co., bankers, London, due 21 May.

W. D. TURNER, JUN.

Upon the back of this bill are the following endorsements, viz.:

Pay to the order of the First National Bank of Canton, Ill.

HUMPHREY BELL & CO.

Pay First National Bank Chicago, or order for collection, account of First National Bank of Canton, Ill.

C. T. HEALD, *Cashier.*

Pay to the order of the City Bank of London, for account of First National Bank, Chicago.

H. SYMONDS, C.

The other two bills are the same, and the acceptances and endorsements the same as the above, except that they are for £800 each, and one is dated March 11, 1878, and is accepted as "due 31st May."

The three bills of exchange and letters accompanying same were, on the days they bear date, forwarded by post by Heald, as cashier to defendant in error, at Chicago, who placed the amount thereof, at the then current rate of foreign exchange, to the credit of the Canton bank, in the Commercial National Bank of Chicago. The letters from Heald, cashier, enclosing the bills of exchange, state that same are "For collection and "credit." These bills were forwarded by the defendant in error to the City Bank of London, England, where they were accepted by W. D. Turner Jr., the drawee.

At the time these bills were drawn Mr. Bell also delivered to the Canton bank with each bill, and as security therefor, a through bill of lading to Liverpool, England, for 120 boxes bacon. These bills of lading showed that the bacon was shipped by Humphrey Bell & Co., and that they were also the consignees. The bills of lading were endorsed in blank by the consignees when so delivered.

At the same time Mr. Bell delivered to the Canton bank with each bill of exchange, a letter of hypothecation.

Attached to each bill of exchange and forwarded therewith by the Canton bank to the Chicago bank, and by the latter to the London bank, was one of the bills of lading and letters of hypothecation.

During the time the bills, which were sixty days' sight, were running, the papers and the bacon having been forwarded, remained in possession of the City Bank of London. Turner failed to pay the bills. On the 21st and 31st days of May, being the same days on which the bills on their face matured and become due, and without allowing days of grace, a protest for non-payment is claimed. Thereupon the London bank cabled to the Chicago bank that the bills had gone to protest. The Chicago bank then wrote to the Canton bank stating that bills had gone to protest and asking a reply by wire as to what disposition should be made of the property. Heald consulted Mr. Bell, who said to Heald that the bacon must not be given up, and suggested the name of Alfred Jacks, who was a provision broker in Liverpool, as a broker to sell the bacon. Heald telegraphed to Chicago bank: "Request Alfred Jacks to sell goods for benefit of drafts." Upon receipt of this dispatch the Chicago bank cabled to the London bank: "Let Alfred Jacks, Liverpool, sell "7983, 7984, under your control." These figures refer to the numbers on two of the drafts and bills of lading. It was intended by this telegram, and so at the time understood by Bell, Heald and the Chicago bank that the bacon was not to be given up to Jacks or any other person. The cablegram was also so understood and interpreted by the Chicago bank and by the London bank.

No notice of protest was sent to either of the Whitnahs, nor were they or either of them ever in any manner informed that the drafts had been protested (or even that they had ever been drawn), until about the time or after this suit was commenced in October, 1878.

One Pollock, *assistant* manager of the City Bank of London, sent the bills of lading to Alfred Jacks & Co., thus delivering possession of the bacon—May 27th, 240 boxes, and June 7th 120 boxes—instructing that sale be made "as promptly as possible," and net proceeds returned to London bank. No returns of sales were made by Jacks & Co. to London bank, and none called for, and, apparently, no further attention given to the matter by either the Chicago bank or the London bank *until August 22*, nearly three months after the bacon had been sent to Jacks & Co., when the *assistant* manager called upon Jacks & Co., by letter, to report. In the meantime Jacks & Co. had sold the bacon (except seventeen boxes), collected the proceeds, over £2,435, being then $11,848.33, and then failed. Of this sum over $8,500 was received by Jacks & Co. in the month of June.

July 19, 1878, the Chicago bank wrote to Canton bank, stating that these drafts had been *charged to its account* by the Chicago bank, "with interest and expenses, "amounting to $12,108.98, for which please make reimbursement. The meats are in the hands of the *broker* "named by you, for realization. When account sales is "made, will advise you promptly."

July 23, Mr. Foster, who had been written to by Bell, called at Chicago bank and inquired as to the object of claiming the entire amount of the drafts, and was there informed that that was a matter of form, and that they only wanted a "margin," and that $1,000 margin would be satisfactory. This was reported by Mr. Foster, and July 25th Heald, cashier, wrote: "I hand you draft "$1,000 *for margin*, and hope you will consent to carry "the matter till *returns* are *received from the sale of* "*stuff*."

This was the last known or heard of the matter here, until September 13, 1878, when the Chicago bank wrote to Mr. Heald that it was just in receipt of advices by cable, of the failure of Jacks & Co., "the *brokers* in whose "hands you instructed us to place the meats," and requesting full reimbursements. To this Heald responded September 14, that he could not understand why reimbursement for the full amount of the drafts was demanded when "the meats or proceeds, of course, *are and have* "*been* at your disposal," and asking what had been done with the proceeds. To this the Chicago bank replied

September 16th: "When reimbursed, *of course, the* "*property would be transferred to your orders*, but we "are under no obligation to await reimbursement from "the property itself."

October 7, Chicago bank wrote to Canton bank threatening a suit unless satisfactory adjustment was made at once. To this Heald replied, October 14, that Bell & Co. would not comply with demand, and requesting the Chicago bank to sue Bell & Co., and offering to cash the judgment and take an assignment immediately upon its being secured, and stating that if voluntary reimbursement was made it might seriously affect their claim against Bell & Co.

It was then agreed between the Chicago bank and Canton bank that Chicago bank should sue Bell & Co., and the Canton bank should pay one-half the expenses and cash the judgment when recovered, and a bond with sureties was given by the Canton bank to indemnify the Chicago bank, reciting that this suit was to be brought at the request of the Canton bank, and that it should not in any manner discharge the Canton bank upon its endorsements of said drafts.

Small sums were realized from the estates of Turner and Jacks, and, with the $1,000 margin, were credited on the drafts. The court directed that a verdict be *entered* for $10,937.13. That sum includes ten per cent. statutory damages.

The declaration contains a special count upon each of the bills of exchange and the common counts. The plaintiffs in error plead separately, filing various special pleas of off-set, recoupment, etc., besides the general issue, upon which issue is joined.

# ERRORS.

*First.* The court erred in holding that days of grace were allowed, and that the bills of exchange sued upon were duly protested in apt time.

They are foreign bills, payable sixty days after sight, accepted by the drawee, and thereby in terms made "due 21 May" and "due 31 May," respectively, there being no date showing when they were sighted or accepted. The pretended protests were made on the days when, by the acceptances, they became due, viz: May 21 and May 31, no days of grace being allowed.

The court took the case from the jury and directed that a verdict be entered in favor of plaintiff below for the amount claimed (Rec., 191), and refused to instruct the jury as requested by defendant's attorneys in sixth and seventh request, pages 189-90 of the record, viz:

" Sixth—That the bills of exchange sued on in this case " are what are known to the law as foreign bills; that upon " such bills three days, called days of grace, are allowed " by law after the day on which they become due or mature; that such a bill does not become due, in fact or in " law, on the day mentioned on its face, but on the last day " of grace (1 Peters, 31); that unless such bills are duly " protested on the last day of grace (or on the second day, " if the last day be Sunday), such protest is not duly " made, and the drawers and endorsers are thereby discharged from liability upon such bills."

"Seventh--That, if the jury believe from the evidence "and under the instructions of the court that the bills of "exchange sued upon in this case were not protested upon "the last day of grace (or upon the preceding day, if the "last day fell on a Sunday), then the verdict of the jury "must be for the defendants."

*Second.* The court erred in holding and ruling at the trial that the City Bank of London was the agent of plaintiffs in error and of them only.

This ruling was based upon the letters of hypothecation set out in full in the record p. 126 and *post* p. 29. These letters set out an agreement with the Canton bank and not with defendant in error; have no words of negotiability, are not transferable and were not assigned or transferred by the Canton bank; they show a personal trust reposed in the *manager* of the City Bank of London, they were not acted under or relied upon by any of the parties; the interpretation by the parties is shown by their acts and should control, and is not the interpretation made by the court below. The letters of hypothecation were waived and abandoned, and limited and controlled by the acts of parties and by subsequent letters, telegrams, cablegrams and oral instructions. The bacon was not placed with the London bank by plaintiffs in error—the loss of the bacon was the result of negligence, for which plaintiffs in error were not in law or in fact responsible, and the court erred in ignoring these facts.

Even if the London bank was in any sense agent of plaintiffs in error, it was only as a common agent for its joint principals, the plaintiffs, and the defendant in error and the court below erred in not so holding.

*Third.* The court erred in holding that the endorsements in writing upon the drafts sued upon could be altered, contradicted and their effect varied by parol proof, and in permitting parol proof to be introduced for that purpose.

*Fourth.* The court erred in including in the finding statutory damages under the statute of Illinois. (See this statute in full, *post* p. 57.)

The drafts were not duly protested. (See first error.)

" Due notice " was not given to either of the Messrs. Whitnah, two of the plaintiffs in error as required by said statute in order to charge them with statutory damages.

No recovery could be legally had upon the special counts in the declaration which are ordinary special counts upon bills of exchange, and statutory damages cannot be recovered under the general money count.

The court should have granted the defendants' request to instruct the jury as follows:

" Eleventh—That under the pleadings and proof in this " case the jury cannot allow the ten per cent. statutory " damages claimed by plaintiff."

*Fifth.* The court erred in admitting testimony offered by plaintiff below and in excluding evidence offered by defendants below.

Witnesses were permitted to give as evidence in behalf of plaintiff below and against the objections of defendants, statements of persons not the agents or made in the presence of defendants below, or either of them; the contents of written documents; their interpretation of papers in writing which are unambiguous and contain no technical terms requiring explanation; their conclusions from and interpretations of facts and documents in writing; parol statements for the purpose of and intended to alter, contradict and vary written contracts, and their reasons for using certain words and statements contained in written communications,

And were not permitted, when asked on behalf of defendants below, to give facts constituting a part of the *res gesta;* or statements made to or by Mr. Heald, cashier of the Canton bank; or the usage as to giving up meats under numerous like transactions previously had between the same parties; or the fact as to whether the individual signatures of the firm of Bell & Co. were had in this transaction as required by their partnership agreement, of which the Canton bank, to whom the drafts in question were endorsed and delivered, had notice and under which it had previously acted.

The testimony admitted, that offered and excluded, and the objections and exceptions as to same, are set out or quoted at length from the record in the fifth point in argument, *post*, p. 60.

*Sixth.* The court below erred in taking the case from the jury and in refusing to permit the jury to pass upon controverted questions of fact, and in refusing to instruct the jury as requested by attorneys for defendants below.

The court instructed the jury to "render a verdict for "the plaintiff for the sum of $10,937.13 damages, being "the amount shown by the testimony of the witness

" Boulton, including ten per cent. statutory damages, which " was done accordingly." (p. 191.)

That court having held upon the trial that the written contracts might be altered, contradicted and varied by parol proof, and such proof having been admitted, it became an important question of fact to determine whether plaintiff below had purchased the drafts or received them for collection. Upon that question Mr. Heald (pp. 101 and 102), Mr. Gage (pp. 114, 115 and 116) and Mr. Boulton (pp. 132 and 133) gave testimony tending to show that plaintiff below purchased them. On behalf of defendants below and in addition to the written contracts themselves and the letters remitting the drafts, there was the testimony of Mr. Foster (pp. 137–8), Mr. Bell (pp. 173 and 174) and of Mr. A. J. Whitnah (p. 140), tending to show that the drafts were not so purchased. Much of this testimony was directly contradictory, and the question of its weight and credibility should have been left to the jury. If the court refused to hold that upon the face of the papers the drafts appeared to have been prematurely protested, it should then have submitted to the jury, as a question of fact, whether the days of grace were included in the time fixed by the acceptor when the drafts should become due.

The jury should have been allowed to determine under proper instructions of the court, whether, under all the facts and circumstances, the London bank was the agent of the plaintiff or of the defendants, or of both, in regard to the disposition of the bacon.

Also, whether, in fact, the property was disposed of by the London bank under the letters of hypothecation, or under the instructions contained in letters, telegrams and cablegrams introduced in evidence.

Also, whether it was in fact intended by defendants below, by their instructions and telegrams, to change or limit the terms or powers as to selling the bacon, and that this was so understood, accepted and acted upon by plaintiff below.

Also, whether there was, in fact, negligence by the plaintiff below, or its agents, officers or employes, by reason of which a loss accrued to defendants below.

Also, whether the plaintiff below did in fact assume control of the property and place it beyond the control of defendants below; and

Also, whether there was, in fact, negligence by the plaintiff or those acting for it, in leaving the proceeds of the property in the hands of a *factor* for several months, and that loss accrued to defendants by reason of such negligence.

The court below should not have withdrawn all questions of fact from the jury, and should also have instructed the jury upon questions of fact, as requested by defendants' attorneys in their sixth and seventh requests set out in first error, and in their eighth and tenth requests (pages 189 and 190), to wit:

"Eighth—That brokers are 'those who are engaged "for others in the negotiation of contracts relative to "property, with the custody of which they have no con"cern.'

"Provision brokers, or merchandise brokers, are 'those "who negotiate the sale of merchandise (or provisions) "without having possession or control of it, as factors "have.' If, therefore, the jury believe from the evidence "and under the instructions of the court, that the plaintiff, "or the City Bank of London was authorized or instructed by the defendants to employ Alfred Jacks as "broker only, and that without the authority or instructions "of defendants, said plaintiff or said City Bank of London "turned over the meats in question and the control and "possession thereof to said Jacks, with the power and authority to sell the same, and to collect and receive the "proceeds of such sales for account of said City Bank of "London, and that there was any loss thereby which could "not or would not have accrued if said Jacks had been "employed as a broker only, then such loss is not the loss "of defendants in this case, and the jury, in determining "upon their verdict will allow the defendants the amount of "such loss, if any, as they believe from the evidence was "sustained.

"Tenth—That if they believe from the evidence, and "under the instructions of the court, that the First National Bank of Canton, Illinois, would not be entitled to "recover a judgment against the defendants, if it were "plaintiff in this case, that then their verdict in this case "will be for the defendants."

*Seventh.* The finding and judgment of the court below are contrary to law and to the evidence.

# BRIEF.

1st. The drafts sued on are foreign bills of exchange drawn at sixty days after sight and accepted by the drawee, and thereby in terms made "due 21 May" and "due 31 May," respectively. (p. 106.) There is no other date in either acceptance, and no proof as to when they were sighted. The pretended protests were made on the days the drafts were due, without allowing days of grace. (p. 107.) The protests were premature, and the drawers were thereby discharged.

*Bank of Washington* v. *Triplett*, 1 Pet., 31.
*Cook* v. *Renick*, 19 Ill., 601.
*Perkins* v. *Franklin Bank*, 21 Pick., 485.
*Montgomery Co. Bk.* v. *Albany City Bk.*, 8 Barb., 399. Affirmed (as to one defendant) in 7 N. Y., 461.
*Bowen* v. *Newell*, 8 N. Y., 194.
*Ivory* v. *Bank*, 36 Mo., 475.
*National Bank* v. *City Bank*, 103 U. S., 670.
*Hoover* v. *Wise*, 91 U. S., 313.

2d. The City Bank of London was not the agent of plaintiffs in error. Even if it can be properly claimed that that bank was authorized to act at all, in view of all the facts and circumstances, for plaintiffs in error as to the bacon, it would be only as a common agent for its joint principals, the defendant in error and the plaintiffs in error.

*Dows* v. *National Bank*, 91 U. S., 618, 632.
Story on Agency, Sec. 38, and note.
*Insurance Co.* v. *Scott*, 1 John. R., 110.
*Smith* v. *Ayer*, 101 U. S., 326.
*Attorney General* v. *Drummond*, 1 Dr. & War., 353.
*Nickerson* v. *A., T. & S. F. Ry. Co.*, 17 Fed. Rep., 409, 410–11.
*Insurance Co.* v. *Dutcher*, 95 U. S., 269, 273.
*National Bank* v. *City Bank*, 103 U. S., 668, 670.

3d. The drafts and the endorsements are all in writing (pp. 105–6), are unambiguous, and cannot be altered, contradicted, added to or subtracted from, or their effect varied by parol evidence.

*Cox* v. *National Bank*, 100 U. S., 713.
Parsons on Notes and Bills, 54, 55.
*Brown* v. *Wiley*, 20 How., 442, 447–8.
*Specht* v. *Howard*, 16 Wal., 565, 566.
*Brown* v. *Spofford*, 95 U. S., 474, 480.
*Forsythe* v. *Kimball*, 91 U. S., 291, 294.
*Martin* v. *Cole*, 104 U. S., 30, 37.
*White* v. *National Bk.*, 102 U. S., 658, 660–61.
*Mechanics' Bank* v. *Valley Packing Co.*, 70 Mo., 643, and 4 Mo. Apl. Cases, 201.
*Beattie* v. *Browne*, 64 Ill., 362.
*Skelton* v. *Dustin*, 92 Ill., 52.
*Bank* v. *Caverly*, 7 Gray, 220.

*Howe* v. *Merrill*, 5 Cush., 82.
*Campbell* v. *Robbins*, 29 Ind., 272.
*Dale* v. *Gear*, 38 Conn., 17.
*Charles* v. *Dennis*, 42 Wis., 57.
*Dixon* v. *Clayville*, 44 Md., 578.
*Woodward* v. *Foster*, 18 Gratt. (Va.), 204.

4th. Statutory damages which it is provided by the statutes of Illinois may be recovered in certain cases, can be recovered only where a recovery is had upon the draft as a definite commercial contract. They cannot be allowed under the money count for money had and received. They are in the nature of a penalty and should not be allowed in a *quantum meruit* judgment. In the case at bar there could be no recovery upon the drafts as such contracts.

And such recovery can be approved only when the draft has been *duly* protested and *due* notice thereof given. The drafts sued on were not duly protested and no notice whatever was given to the two plaintiffs in error, A. J. and H. A. Whitnah, or either of them.

Statutory damages should not have been allowed.

Rev. Stat of Ill. (1881) Ch. 98, Sec. 1, p. 747.
*Hambro* v. *Casey*, 110 U. S., 216–17.
*White* v. *National Bank*, 102 U. S., 658, 662.

5th. Incompetent testimony was admitted for plaintiff, and competent evidence, offered by defendants, was excluded upon the trial. (Pp. 101, 102, 103, 114, 116, 131, 176, 178, and 180.)

6th. Controverted questions of fact must be submitted to the jury under proper instructions by the court as to the law. These questions were in this case all taken from the jury and a finding entered by the court (p. 191.)

*Railroad Co.* v. *Bank*, 12 Wal., 227, 231.
*Tracy* v. *Swartwout*, 10 Pet., 80, 95.
*C. & N. W. Ry. Co.* v. *Moranda*, 108 Ill., 582.
*Greenleaf* v. *Birth*, 9 Pet., 292, 299.
*Improvement Co.* v. *Munson*, 14 Wal., 442, 448.
*Pleasants* v. *Fant*, 22 Wal., 116, 120–21.
*Simmons* v. *C. & T. R. R. Co.*, 110 Ill., 346.
*Insurance Co.* v. *Rodel*, 95 U. S., 233; 238.
*Insurance Co.* v. *Doster*, 106 U. S., 30, 32.
*National Bk.* v. *City Bk.*, 103 U. S., 668, 670.
*Manchester* v. *Erricsson*, 105 U. S., 347, 349.
*Insurance Co.* v. *Lathrop*, 111 U. S., 613, 615.

7th. The finding and the judgment of the court below are contrary to the law and the evidence.

# ARGUMENT.

It is respectfully but confidently asserted that the justice of the matter here in controversy is manifestly with the plaintiffs in error. They have paid these drafts once, and ought not to have to pay them again. They will therefore be protected if it can be done consistently with the established principles of law.

When the drafts were delivered to the Canton bank, there was also at the same time delivered with them to that bank property belonging to plaintiffs in error of the value of more than the amount of the drafts. This property was delivered with the drafts by the Canton bank to the Chicago bank (defendant in error), and by the latter to the London bank. The property and the proceeds thereof were lost by the negligence and misconduct of the London bank. Had that bank retained the possession and control of the property, as it was expressly directed to do by the defendant in error, no loss would have occurred, the bills would have been paid from the proceeds of the sale of the property, and this suit would never have been commenced; but the London bank did not comply with such instructions, and therefore and by reason of negligence, and a total disregard and violation of instructions, the loss arose.

The general proposition will not, of course, be controverted, that if the property delivered by plaintiffs in error, with the drafts, was equal in cash value to the amount of the drafts, and such property or the proceeds thereof was actually lost by reason of the unquestioned negligence and fault of defendant in error, or its agent or employees, without any action, interference or direction by plaintiffs in error, or either of them, or any one acting for them by their authority; that then defendant in error ought not to sustain a judgment against plaintiffs in error recovered upon the drafts. If the rule be otherwise, then an innocent party must suffer a loss occasioned by the negligence of another. This is neither justice nor law.

The only answer on the part of defendant in error, to the application of this principle, is based upon the letters of hypothecation admitted in evidence. The proper and legal interpretation of these we will consider later. As a matter of fact, however, as appears by the record in this case, plaintiffs in error had not and did not assume to have any practical or actual control over the property, whatever interpretation may be given to the letters of hypothecation. Defendant in error delivered the drafts, the property and the letters of hypothecation to the London bank and gave all the instructions which were ever given to that bank in regard to the whole matter. Neither of the plaintiffs in error ever wrote to or communicated with that bank. That bank never wrote or reported to plaintiffs in error, or in any way or manner recognized them as being to any extent interested in the property or in any way or manner purported or pretended to be acting for or as the agent of plaintiffs in error. If, therefore they are to be held liable it must be under some positive rule of law binding upon this court, and not upon any principle of justice.

We feel authorized to speak thus positively as to the justice of this case, not only from the evidence, but from the other facts appearing in the record. This case has been tried three times in the court below. At the first trial in February, 1880, before Honorable Henry W. Blodgett, District judge, the jury failed to agree. Afterward, depositions were taken in England, and then the case was again tried before Honorable Thomas Drummond, Circuit judge, when the jury returned a verdict in favor of defendants below (plaintiffs in error) and assessed their damages at $386.17. At the third trial before **Blodgett**, J., "and after hearing the concluding "arguments of counsel, the court directs the jury to re"turn a verdict for the plaintiff for the full amount of the "plaintiff 's claim" (p. 85). It is a fair presumption from the record, aside from all impressions of one who was present at each trial, that the court below would not have assumed to take the case from the jury, upon what he conceived to be the law applicable to the case, had he not at the same time felt assured that the jury would have again rendered a verdict in favor of defendants below. It is not, therefore, the opinion of counsel only, that the very justice of this case is with the plaintiffs in error.

It is, however, conceived that the law is also with plaintiffs in error.

## I.

### THE DRAFTS SUED ON ARE FOREIGN BILLS OF EXCHANGE, AND WERE PREMATURELY PROTESTED, AND THE DRAWERS THEREBY DISCHARGED.

The acceptance by the drawee, is in these words written across the face of the drafts, viz: "Accepted, payable "at Messrs. Barclay & Co., bankers, London, due 21

"May." They are drawn at sixty days sight. The acceptances are not dated. There is no evidence whatever tending to show when they were "sighted," or on what day they were accepted by the drawee. There is no evidence whatever in the case to change, alter, modify or explain the language of this acceptance, or to show, or tending to show that days of grace were included in the time fixed in the acceptance, even if that would be proper. The claim that days of grace were included in the acceptance, must be determined and found from and upon the words of this acceptance only.

Had it not been construed otherwise, no time would here be occupied upon this point, as it would be treated as concluded, by the language of the acceptance that days of grace must be allowed following the date of maturity there named. There is nothing ambiguous in the language of this acceptance. There is nothing calling for any explanation. The justice of this case does not call for any strained construction or presumption. The acceptor says as plainly and as concisely as words can be made to express it "due 21 May." On that day the protest was made. No days of grace were allowed.

In *Bank of Washington* v. *Triplett*, 1 Pet., 31, Chief Justice MARSHALL, in delivering the opinion of this court, said: "The allowance of days of grace is a usage which "pervades the whole commercial world. It is now universally understood to enter into every bill or note of a "mercantile character, and to form so completely a part "of the contract that *the bill does not become due*, in fact "or in law, *on the day mentioned on its face*, but on the "last day of grace. A demand of payment previous to "that day will not authorize a protest or charge the "*drawer* of the bill."

In *Perkins* v. *Franklin Bank*, 21 Pick., 483, the note sued on was payable seven months from December 7, 1836. On the margin of the note was written "due "July 7, 1837." It will be noticed that these words on the margin, are, in effect, precisely the same as the words of the acceptance under consideration. In that case it was ~~construed~~ contended that the words on the margin amounted to a waiver of days of grace under a provision of the statute of Massachusetts authorizing such waiver, and under a custom among bankers there, but the court held that such was not the case, and that days of grace must be allowed under the language used in the words on the margin of the note.

The case of *Bowen* v. *Newell*, 8 N. Y. (4 Seld.), 194, was upon an instrument in the form of a check, and directed to the cashier of a bank to pay $2,000 "on the 12th inst." The court of appeals in considering the question of whether days of grace should have been allowed upon this check, say it would have made no difference in the legal rights of the parties "if the check in suit "had been worded 'seven days after date' instead of say-"ing 'on the 12th inst,' and yet if it had borne these "words there would have been no possible ground" for holding that days of grace should not have been allowed. It was there held that days of grace should have been allowed upon the check sued on which was due "on the 12th inst." the check being dated.

In the case at bar the acceptance is "due 21 May." The language is almost identical, and in law the same, and no good reason is perceived why days of grace should be allowed in one case and not in the other.

*Ivory* v. *Bank*, 36 Mo., 475, is a suit upon an inland bill of exchange, payable "on 22d of October." The bill was presented for payment and protested for non-payment on the 22d day of October, the day mentioned on the bill for payment. It was held that this was premature; that it was negligence to present it before grace had expired, and the bank to whom the bill was intrusted for collection was held responsible for the amount of same, on account of such negligence.

As to foreign bills of exchange, demand must be made on the *last day* of grace. "A presentment for payment "on the day before the bill becomes due, allowing days "is grace, is premature." Protest is necessary by the universal law merchant, in case of foreign bills, and forms a part of the constitution of the bill, and a proper protest at the proper time "is an indispensable incident to mak-"ing a drawer of a bill, or indorser of a note, liable."

There need be no special citations of authorities in this court in support of these well established principles. In the case at bar the protest was premature; demand was not made on the last day of grace. This necessary "part "of the constitution of the bills" is absent, and the drawers of the bills (plaintiffs in error) are not liable.

To meet this insuperable obstacle to a recovery upon these bills, as the case now stands before the court, the presumption or assumption is indulged by the court below that the days of grace were included in the time fixed in the acceptance when the bills should become due. As is urged above, there is no doubt, uncertainty or ambiguity in the language of the acceptances. Upon the bills themselves there is no point presents itself for judicial interpretation. The language is simple, plain and concise, *i. e.*, "due 21 May." There is but one interpretation of this language possible, and that is, that the bills matured, became due and payable by the terms thereof—May 21st, 1878. Any presumption that the days of grace were included within that time, or that that date was the last day of grace, is a presumption of *fact*, outside the plain and unmistakable language of the bills, and not a presumption of law; not a question of legal interpretation for the court, even if it be conceded that it would be proper to introduce testimony upon the question of whether days of grace were or were not included in the time fixed by the acceptor, upon which authorities differ, that certainly would not make it a question of law for the court. There might be evidence, clear, conclusive and undisputed, such as that the court would be justified in determining the question as an undisputed question of fact. But that is not the case at bar. There is no evidence whatever in this case to justify any such presumption, and even if any presumption upon this question of fact might be fairly indulged by the trial court, still it is not a conclusive presumption. All the facts in the case would have to be considered.

The fair and reasonable presumption from the record is that the days of grace were not included in the time when the drafts became due by the acceptance. The case was first tried in February, 1880. The question was then presented. Afterward, in December, 1880, defendant in error took depositions in England, and, with others, that of W. D. Turner, Jr., the acceptor of the drafts, who, of all persons, would be the one certain to know whether days of grace were included. From the business experience he is shown to have had, he would have known of any custom affecting the acceptance. Besides, this defendant in error took the deposition of Mr.

Pollock, *assistant* manager of the City Bank of London, the bank to which the bills were sent by defendant in error. If it were true that the days of grace had been included in the time fixed by the acceptor, it might easily have been proven by him; or, if there had been any custom in London or any usage or custom of the City Bank, which could have properly been admitted as evidence, that also could have been very easily proven by him. Besides these, L. J. Gage, the cashier, and Mr. Boulton, the head of the foreign exchange department of defendant in error, were both upon the stand as witnesses upon the trial. Why were they not asked as to the matter if there were any such foreign custom?

It is but fair to presume that no such custom or usage existed, as we claim the fact to be, otherwise it would have been shown. It is also fair to presume that the days of grace were not included by the acceptor, or it would have been shown under the circumstances, and with the witnesses under examination, who would know, if such was the fact.

The London bank was the agent of defendant in error as to the drafts, including demand and protest. Upon this point it makes no difference whether the defendant in error was the owner of the bills by purchase, or the agent of the Canton bank for their collection, or whether the London bank was the agent of plaintiffs or of defendant in error, as to the sale of the bacon. In either case the London bank was the agent of and is responsible only to defendant in error, for any negligence in respect to demand and protest of the bills.

*Hoover* v. *Wise*, 91 U. S., 313.

*National Bank* v. *City Bank*, 103 U. S., 670.

*Montgomery Co. Bk.* v. *Albany Bk.*, 7 N. Y., 461.

The defendant in error has its complete and adequate remedy against its agent, the London bank, for negligence, by which the drawers, plaintiffs in error, were discharged from liability, upon the drafts in question, and this remedy does not exist in favor of any other party to these drafts.

The foreign bills of exchange sued upon in this case, not having been duly protested as required by law, the drawers are discharged, and the judgment of the court below must be reversed, and the defendant in error remitted to its adequate remedy against its agent, the London bank.

## II.

THE CITY BANK OF LONDON WAS NOT AGENT OF PLAINTIFFS IN ERROR, AND WAS AGENT OF DEFENDANT IN ERROR. IF IT CAN BE PROPERLY CLAIMED UNDER ALL THE FACTS AND CIRCUMSTANCES, THAT THE LONDON BANK WAS AUTHORIZED TO DO ANYTHING FOR PLAINTIFFS IN ERROR, THAT WAS ONLY AS TO THE BACON, AND WOULD BE AS A COMMON AGENT ACTING FOR ITS JOINT PRINCIPALS, THE DEFENDANT IN ERROR AND THE PLAINTIFFS IN ERROR.

That the London bank was not the agent of plaintiffs in error as to the drafts is shown above, and we apprehend will not be contested. It is urged on behalf of plaintiffs in error that this proposition is correct as to the bacon, the title to and possession of which was transferred by plaintiffs in error with the drafts.

It will be remembered that the drafts were drawn and delivered to the First National Bank of Canton, at Canton, in Fulton county, Illinois, some 200 miles distant from Chicago, that they were then and there endorsed specially by the Canton bank "for collection account of "First National Bank of Canton, Ill.," and transmitted by post to defendant in error at Chicago, and by the latter endorsed and remitted to the City Bank of London for collection. At the same time plaintiffs in error endorsed and delivered to the Canton bank the bills of lading for the bacon, which were by it transmitted to the defendant in error with the drafts, and by the latter remitted to the City Bank of London. If this were all, then there could be no question whatever, under the authorities, but that the City bank of London was the agent of defendant in error. At the same time, however, plaintiffs in error executed at Canton letters of hypothecation, bearing even dates with the drafts, and delivered the same to the Canton bank with the drafts and bills of lading, which were therewith transmitted to defendant in error, and by it to the London bank. It is contended, on behalf of defendant in error, that by these letters of hypothecation, the London bank was designated and appointed as the agent of plaintiffs in error, and in effect that defendant in error was thereby absolved and relieved from all liability and responsibility as to the bacon. These letters of hypothecation are all alike, and for convenience of reference a full copy is here inserted.

CANTON, Ill., March 4, 1878.

*To the Manager of the City Bank, London, England.*

SIR: We have this day sold to the First National Bank a bill of exchange for eight hundred and fifty pounds on W. D. Turner, Jun'r, against a shipment of 120 boxes bacon. The agreement with the First National Bank is that if said bill is accepted, and the acceptance is satisfactory to you, the bill of lading is to be given up to him, without prejudice to your claim on us, in the event of the bill not being paid at maturity, but if they decline to accept, or if the acceptance is not satisfactory to you, or if the bill be not paid at maturity, then you are hereby authorized to retain the bill of lading, and at any time at your discretion, to place the goods in the hands of your broker for sale, on account of whom it may concern, and apply the proceeds towards the payment of the bill; and in case of any deficiency we hereby agree to pay the amount of such deficiency to the First National Bank on demand, and also that if you should require the transfer of the "policy of marine insurance," the same shall be given, and in case of refusal to transfer by the parties drawn on, then you are to have the privilege of effecting a special insurance, for cost of which you are to have a lien on the above merchandise.

Yours respectfully,

HUMPHREY BELL & CO.

Is the interpretation and construction of these letters of hypothecation contended for by defendant in error correct? Is defendant in error thereby absolved and relieved from all responsibility as to the bacon?

What is meant by letters of hypothecation? Usually the term is applied to marine matters. Bouvier defines hypothecation as "a right which a creditor has over a "thing belonging to another, and which consists in a "power to cause it to be sold, in order to be paid his "claim out of the proceeds."

Mr. Gage, cashier of defendant in error, knew very well the spirit and intent of these papers, knew their office and purport, knew what was intended by them, and knew what the term meant when he said they are "what we call letters of hypothecation." Bouvier's definition is not simply a technical legal one, but is the general and popular meaning, is substantially the same as Webster's definition. No one connected with the papers ever thought at the time they were given of the limited, strained and unnatural construction now claimed for them, or then claimed or understood that the London bank was only the agent of Bell & Co. This is evident from the facts that the London bank communicated with the Chicago bank only, and not with Bell & Co., who, it is now claimed, were its principals; that the Chicago bank communicated with the Canton bank, its correspondent, from whom it received the drafts and the bacon, and not with Bell & Co., from whom it now claims to have *purchased* the drafts; that the Canton bank applied to Bell for instructions and authority; that Bell instructed the Canton bank that the bacon must not be given up; that Bell and Mr. Heald, cashier of the Canton bank, then prepared a telegram to the Chicago bank intending to express and repeat to the Chicago bank the instruction not to give up the bacon; that the Chicago bank so understood it when it instructed the London bank by cablegram to retain control of the bacon; that Bell & Co. never communicated with or gave any instruction to the London bank, which, it is now claimed, was solely their agent; and that Bell & Co. gave that matter no further attention for months, supposing the goods had been sold and the bills paid. That neither Bell & Co., nor Heald, cashier, had the slightest idea of any such agency, cannot be seriously questioned. To hold, years afterwards, that the London bank was solely the agent of Bell & Co., is directly in conflict with what was then supposed to be the facts and the relations of the respective parties, is to hold Bell &

Co., by legal interpretation of these papers, to a relation and liability which was not then supposed or understood by the parties to exist. This should not and will not be done if any other proper, legal interpretation of these papers can be adopted.

The letters of hypothecation are dated at Canton, Illinois. They set forth an agreement between Bell & Co. and the "First National Bank," that is, of course, the First National Bank of Canton, where and with whom the transaction was had, and to whom they were delivered with the drafts and bills of lading. Neither Chicago, nor the First National Bank of Chicago, is mentioned or referred to in them. They state the terms of an agreement between Bell & Co. and the Canton bank. The mere fact that they passed into the possession of the Chicago bank, does not establish a contract between Bell & Co. and the Chicago bank. If they had, in the same manner, passed into the possession of a Chicago bank of any other name—the National Bank of America, for instance—surely it could not be claimed for a moment that thereby a contract or agreement was made or established between Bell & Co. and that bank, or that they constituted a notice of any agreement between that bank and Bell & Co. There is no endorsement or assignment of them to the First National Bank of Chicago, even if that could have been of any effect. They were notice to all persons into whose hands they pass from the Canton bank of the terms of the agreement between Bell & Co. and the Canton bank, and are just as binding, as to all such persons, as though signed by the Canton bank. They hypothecate the bacon to the Canton bank. The bacon was not, however, transferred by the letters of hypothecation. That and the title thereto were transferred and delivered by the bills of lading, and the endorsement and delivery thereof. Such transfer and delivery were complete and absolute without and independent of the letters of hypothecation.

If the Chicago bank purchased the drafts as is now claimed, it took no right, title or interest under or by virtue of the letters of hypothecation. It received the drafts and the bacon with the same obligations and duties, and with the same rights and powers as though no letters of hypothecation had ever been made. These letters do not run to the assigns of the Canton bank. They contain no words of negotiability, and no authority to substitute by endorsement, assignment, or otherwise, any other party in its place. And no assignment or transfer was made or attempted. The Chicago bank, defendant in error, took and acted under these hypothecation papers for and as the agent of the Canton bank, or it took nothing under them. If it *purchased* the drafts, it must recover in this case, if at all, independently of the letters of hypothecation. It was upon the theory, and only upon the theory, that defendant in error *purchased* the drafts, that it recovered judgment in the court below. If defendant in error did not purchase the drafts, but was acting as agent of the Canton bank, then, unquestionably the court below erred.

But even if the letters of hypothecation were to be construed in this case the same as though the Canton bank had been the plaintiff in the court below, still the interpretation by the court below is erroneous. As between the Canton bank and Bell & Co., it cannot be properly said that they amount to more than a mutual employment or appointment by Bell & Co. and the Canton bank of the *manager* of the City Bank of London to act for them in regard to the sale of the bacon upon the happening of certain contingent events. Bell & Co. parted with the possession and title to the bacon. The bank had a complete title to it.

*Dows* v. *National Bank*, 91 U. S., 618, 632.

But Bell & Co. were still interested in having it properly disposed of and the drafts paid out of the proceeds and to receive the surplus which it was then supposed there would be. Thus both parties were interested in the property—they had a joint interest. By agreement they jointly designate the *manager* of the London bank.

Where parties have a joint interest in or title to, chattels, they may employ an agent to act for them jointly in regard to such chattels; and in case a loss arise by the act or negligence of the common agent, such loss must be borne by the principals according to their respective interests.

Story on Agency, Sec. 38 and note.
*Insurance Co.* v. *Scott*, 1 John. R., 110.

The agreement set out in the letters of hypothecation is, that if the drafts were not paid at maturity the goods were to be sold "on account of whom it may concern." That is, in substance, according to the respective interests of Bell & Co. and the Canton bank, and the amount of the interest of the bank is given definitely. Had the money, proceeds of sale of the goods, come into the hands of the manager, he would have known how it was to be divided without any further information or instruction.

By the agreement set forth in the letters it was also provided that: "In case of any deficiency we hereby "agree to pay the amount of such deficiency to the First "National Bank, on demand, and also that if you (*i. e.*, "the *manager* of London bank) shall require the transfer of the policy of marine insurance, the same shall be "given," etc. This implies that Bell & Co. are not liable *under this agreement* unless a deficiency arises, whatever may be their liability upon the draft. If the manager was made the agent of Bell & Co. only, the question naturally arises why he should be authorized to call upon them for transfer of insurance. Why should the agent "require" of his principal this transfer of insurance? Simply because he was to be the agent of both Bell & Co. and the Canton bank. For the protection of one of his principals he, by their joint agreement, was authorized to "require" certain things from the other.

Test the question as to whether the relation of principal and agent existed here, by some of the rules applicable to that relation.

The principal is chargeable with notice of all facts, notice of which can be charged upon his agent.

*Smith* v. *Ayer*, 111 U. S., 326.

Suppose that the Canton bank or the Chicago bank, had given notice to the London bank (or to the manager of that bank), of some particular matter as to the bacon, such, for instance, as that the bacon had been attached or taken upon some other legal process before leaving America, or that the Chicago bank had sent the bacon to some other party, which it had a right to do, and that Bell & Co. had no actual notice or knowledge of the fact. That of itself would not have constituted notice to Bell & Co. so as to charge them therewith.

Again, a principal is bound by the acts of his agent, which are within the scope and authority of the business intrusted to him.

Suppose that the letters of hypothecation had been sent to the manager of the City Bank of London, and that the Chicago bank had retained the drafts and bills of lading, as it might legally have done. Could the manager then, after the drawee had failed to pay the bills, have made a contract for the sale of the bacon which would have been binding upon Bell & Co.? Certainly that will not be claimed. Then the manager was not the agent of Bell & Co. only. The letters of hypothecation did not alone and of themselves, constitute an agency with power of sale.

On the other hand, suppose that the letters of hypothecation had never been sent to London, or had been withdrawn, and the bills of lading and the drafts had been retained there, with no revocation of authority by the defendant in error. The London bank might then have made a contract for the sale of the bacon, which the purchaser could have enforced.

The letters of hypothecation did not then, of themselves, constitute an agency with a power to sell—nor did they, when taken in connection with the other papers, constitute an agent of Bell & Co. only.

This record shows that the London bank did not assume to, and did not act under the letters of hypothecation in placing the bacon with Jacks & Co. for sale. All the provisions of these letters either had been acted upon, and the power thus far exhausted, or had ceased to be applicable or operative, except that of placing the goods in the hands of a *broker* for sale. The London bank, instead of acting under this, and placing the goods in the hands of a broker for sale, cabled to the Chicago bank. The Chicago bank wrote to the Canton bank, asking what they should do with the meats. This was communicated to Mr. Bell by the Canton bank. Bell requested that Alfred Jacks be allowed to sell the meats as a broker, but at the same time instructed Mr. Heald, the cashier of the Canton bank, that the meats must not be given or delivered to Jacks. Heald and Bell together, framed a telegram intended to be to that effect, and Heald, as cashier, sent it to the Chicago bank. This the Chicago bank understood as was intended, and cabled the London bank to let Jacks & Co. sell the meats, but directed the London bank to retain control of same. The London bank, instead of retaining control of the meats, as directed, turned them over to Jacks & Co.

It cannot be said that the London bank acted under the letters of hypothecation in selecting Jacks & Co., or in turning the meats over to him as *factor* instead of placing them with a *broker* for sale. The cablegram is complete within itself. It would be full and complete instructions if no letters of hypothecation had ever existed. In this manner a new arrangement was made. The letters of hypothecation were not acted upon, and had no more effect, in fact, than as though there had never been any such papers. There was no suggestion or instruction from Bell to the party now claimed to be his agent exclusively. There was a new arrangement under the then existing state of facts. The Chicago bank assumed to and did change the telegram from Heald, in giving orders to the London bank. To assume that thereafter the London bank was the agent solely of Bell & Co., is an afterthought, and to hold that such agency did in fact exist, so as to charge upon Bell & Co. the entire loss, is to do violence to the then understanding of all the parties, at least to that of all the parties on this side of the Atlantic.

It is a rule of construction, specially applicable in this case, to apply the interpretation which the parties have given to the contract by their own acts.

There is nothing in this record tending to show that the parties understood or interpreted the letters of hypothecation, as it is now claimed to interpret them. Indeed there is no evidence that they were ever acted upon, or that they were ever relied upon as constituting an agency until after this suit was commenced. There was nothing done, up to the time of the pretended protest of the drafts, except what might as properly have been done, and which, doubtless, was done, under the drafts and bills of lading, and the instructions of defendant in error. When the pretended protest was made, neither the London bank nor the manager assumed or pretended to act under the letters of hypothecation, but cabled to the defendant in error. The defendant in error did not reply, relying upon the letters, but ignored them entirely and wrote to the Canton bank for instructions. The Canton bank also treated the matter in every respect as though there were no such letters in existence, and conferred with Bell. Bell requested that Alfred Jacks be allowed to sell the meats, but at the same time instructed that the meats should not be given up, no reference whatever being made to the letters of hypothecation.

Plaintiffs in error had no correspondence or communication of any kind with the London bank. They never, in any manner, acted as though it was their agent, or did anything upon the theory that such an agency existed.

Not only is there nothing in the record showing that any of the parties understood or acted upon the letters, as it is now claimed they are to be interpreted, but it appears that the parties did not, and did not pretend to act under the letters, but under the telegrams and cablegrams, and the interview between Heald and Bell.

In *Atty. General* v. *Drummond*, 1 Dr. & War., 353, Lord Chancellor SUGDEN says: "Tell me what you have "done under a deed and I will tell you what that deed "means."

In *Nickerson* v. *A., T. & S. F. R. Co.*, 17 Fed. Rep., 409, MCCRARY, J., says (pp. 410–11): "It is enough to "say that the construction which the parties themselves "placed upon their own contract, and upon which they "have so long acted, is the one which the court ought to "adopt."

In *Insurance Co.* v. *Dutcher*, 95 U. S., 269, Mr. Justice SWAYNE, in stating the opinion of this court (p. 273) says: "The practical interpretation of an agreement by "a party to it is always a consideration of great weight. "The construction of a contract is as much a part of it "as anything else. There is no surer way to find out "what parties meant, than to see what they have done."

Interpreted by this just and well settled rule of construction the letters of hypothecation cannot be given the controlling construction now claimed.

The London bank was the agent of the Chicago bank, the defendant in error.

In *Milwaukee National Bank* v. *City Bank of Oswego* 103 U. S., 668, the facts were briefly these: The Milwaukee bank purchased certain drafts and received therewith bills of lading for certain cargoes of wheat as security. The Milwaukee bank enclosed the drafts and the accompanying bills of lading to the Oswego bank with instructions to deliver the wheat on payment of the drafts. The Milwaukee bank claimed that the Oswego bank improperly or negligently failed to retain the wheat, that a loss thereby occurred, and that the Oswego bank was liable to it therefor. Upon this state of facts this court (p. 670) say: "The city bank, in receiving the drafts, "and bills of lading with instructions to deliver the wheat "to A. F. Smith & Co., on payment of the drafts and "acknowledging receipt of the drafts, became the agent "of the Milwaukee bank in the business which it had "undertaken."

In the case at bar, the facts, except the letters of hypothecation, are substantially the same as in the case just quoted from, so far as the question of agency is concerned. As to this question it makes no difference whether defendant in error purchased the drafts, or took them from the Canton bank for collection. The Chicago bank certainly made the London bank its agent for some purpose and with some power. For what purpose? The drafts were delivered to it. It, the London bank, was not the owner of them, but held them as the agent of somebody. They surely were not delivered to it as the agent of Bell & Co. It held them as the agent of the Chicago bank. The same may be said as to the bacon. The bills of lading, therefore, were attached to and remitted with the drafts. It does not appear that there were any other or different instructions by defendant in error as to the bills of lading from those as to the drafts. The London bank was not the owner of the bacon, but held it as the agent of somebody. There surely was no unconditional delivery of the bacon to the London bank as the agent of Bell & Co. If so, Bell & Co. could have taken it from their agent and have done as they pleased with it. This cannot be claimed. Bell & Co. and the Chicago bank (or its principal, the Canton bank), were the only parties for whom it could have been the agent in this matter. It must have been and was the agent of the Chicago bank, from which it received the bacon, as well as the drafts—from which it received its instructions as to both—to which it was answerable, and to which, only, it reported. It was error in the court below to give to the letters of hypothecation such construction—such potent and magic power—as to change the real to the unreal. This is not a case where shrewd and experienced drawers of drafts have overreached, by some subtle wording of papers, an inexperienced holder. The reverse of this is true, if the interpretation now claimed for the letters of hypothecation is sustained.

## III.

### THE DRAFTS AND THE ENDORSEMENTS ARE ALL IN WRITING, ARE UNAMBIGUOUS, AND CANNOT BE ALTERED, CONTRADICTED, ADDED TO OR SUBTRACTED FROM, OR THEIR EFFECT VARIED BY PAROL EVIDENCE.

The drafts, with the acceptance and all endorsements, are set out in full in the foregoing statement of facts. (p. 3) The endorsements which will be considered under this point are: "*Pay to the order of First National* "*Bank of Canton, Ill.*—HUMPHREY BELL & Co.," and

"*Pay First National Bank, Chicago, or order, for col-*
"*lection account of First National Bank of Canton, Ill.*—
"C. T. HEALD, *Cashier.*"

The record shows that parol evidence was admitted at the trial to contradict and vary the effect of both of these endorsements, and that the court below held that they should not stand and be construed as written. The important question is presented, whether commercial paper is to be construed in courts of law according to its terms, or whether it may be changed as the various judges of the numerous courts may seem inclined. We claim that this was done, in this case, upon partisan evidence, given in pursuance of what may be termed a conspiracy to recover for losses incurred through the negligence of the witnesses or those acting for them and under their direction.

Before further considering the record we will cite a few of the great number of cases in the books bearing upon this point.

"Acceptors of a bill of exchange stand in the same "relation to the drawee of the bill as the maker of a note "does to the payee, the acceptor being the principal "debtor in a bill, precisely as the maker is of a promissory "note."

*Cox* v. *National Bank*, 100 U. S., 713.

After acceptance the drawer stands in the same relation to a bill of exchange that the first endorser does to a promissory note.

Parsons on Notes and Bills, 54, 55.

This suit is then, in legal effect, by the third endorser (second endorsee) against the first endorser.

*Brown* v. *Wiley*, 20 How., 442, was a suit by the payee (second endorser) upon an accepted draft against the drawer (first endorser).

Mr. Justice Grier, in delivering the opinion of this court, pp. 447–8, says:

" It presents the question whether parol evidence should " have been received to vary, alter or contradict that which " appears on the face of the bill of exchange. When the " operation of a contract is clearly settled by general principles of law it is taken to be the true sense of the contracting parties. This is not only a positive rule of the " common law, but it is a general principle in the construction of contracts. Some precedents to the contrary may " be found in some of our states, originating in hard cases, " but they are generally overruled by the same tribunals " from which they emanated, on experience of the evil " consequences flowing from a relaxation of the rule.

" There is no ambiguity arising in this case which needs " explanation. By the face of the bill the owner of it had " a right to demand acceptance immediately, and to protest it for non-acceptance.

" The proof of a parol contract that it should not be " presentable till a distant, uncertain or undefined period, " tended to alter and vary in very material degree its " operation and effect."

The case of *Specht* v. *Howard*, 16 Wallace, 565, was by a second endorser against the first endorser of a promissory note.

Mr. Justice Swayne, in delivering the opinion of this court says, page 566, quoting from Parsons on Notes and Bills:

"It is a firmly settled principle that parol evidence of "an oral agreement alleged to have been made at the "time of the drawing, making or endorsing of the bill or "note, cannot be permitted to vary, qualify or contradict, "to add to or subtract from the absolute terms of the "written contract."

*Brown* v. *Spofford*, 95 U. S., 474, was a suit upon five promissory notes by the endorsee against the first endorser. The defense was set up of a settlement in writing as to these notes and that the plaintiff was only the agent for the party with whom the settlement was made, etc.

This court says, p. 480:

"Negotiable notes are written instruments, and as such "they cannot be contradicted, nor their terms be varied by "parol evidence." And also, p. 481:

"Decided cases of the most authoritative character have "determined that parol evidence of an oral agreement alleged to have been made, at the time of the drawing, "making or endorsement of a bill or note cannot be admitted to vary, qualify, contradict, add to or subtract "from the absolute terms of the written contract" citing

*Specht* v. *Howard*, *supra*.

*Forsythe* v. *Kimball*, 91 U. S., 291, was a suit upon a number of notes. The defendant was maker of some and endorser of others, and it would appear the guarantor of still others. The suit was brought by an assignee in bankruptcy of the endorsee. The defendant claimed that the bankrupt was indebted to him for more than the amount of all the notes, and claimed an offset. To establish the fact of the claim parol evidence was offered in the trial court. This court in deciding the questions involved, (p. 294), used the same language above quoted from, and cited *Specht* v. *Howard*, *supra*.

*Martin* v. *Cole*, 104 U. S., 30, was a suit by the holder (endorsee) against the endorser of a promissory note. The defendant sought to interpose as a defense an express agreement between himself and the plaintiff, which was in effect to vary the terms of his endorsement.

Mr. Justice MATTHEWS, in delivering the opinion of this court, on page 37, says:

"The rule is tersely stated in Benjamin's Chalmer's Di-
"gest of the Law of Bills of Exchange, etc., (Art. 56,
"p. 63): 'The contracts on a bill as interpreted by the
"Law Merchant are contracts in writing. Extrinsic
"evidence is not admissible to contradict or vary their
"effect.'

"The rule as declared by Mr. Justice WASHINGTON in
"the case cited was expressly rejected by this court in
"*Bank of the United States* v. *Dunne* (6 Pet., 51), one
"distinct ground of its opinion being that parol evidence
"is not admissible to vary a written agreement, citing the
"language of the court in *Renner* v. *Bank of Columbia*,
"9 Wheat., 581, 587:

"'For there is no rule of law better settled or more
"salutary in its application to contracts than that which
"precludes the admission of parol evidence to contradict
"or substantially vary *the legal import of* a written agree-
"ment.'"

And in the same case this court noticed the language quoted above and cited approvingly *Brown* v. *Wiley*, *supra*, and *Specht* v. *Howard*, *supra*.

The case of *White* v. *National Bank*, 102 U. S., 658, was in many respects like the one at bar. The suit was by a third endorser (second endorsee) against the second endorser. The endorsement was very similar to the second endorsement in question in the suit at bar, viz:

"Pay S. V. White or order, for account Miners' "National Bank, Georgetown, Colorado. J. L. Brown-"ell, P't."

The plaintiff recovered in the court below upon three of the drafts sued upon, which did not contain the special endorsement quoted, and upon drafts containing this special endorsement he failed to recover by reason of this special endorsement. It was said by the plaintiff, to answer the force of this endorsement, that the plaintiff purchased the drafts for their full amount or value and paid for the same as a purchaser.

Mr. Justice Miller, in delivering the opinion of this court, pages 660-61, says:

"The plaintiff relies largely on two propositions to "establish his right to recover against defendant on this "endorsement.

"The first of these is that these words are merely di-"rectory and capable of explanation, and when it is "shown by parol testimony, as in this case, that the "plaintiff bought and paid full value for the draft, with "the understanding that he was buying it as commercial "paper, with the usual incidents of such a transaction, "the endorser is liable in the usual manner, notwithstand-"ing the words we have quoted.

"The other proposition is that such is the custom of "bankers who deal in such paper in New York, where "these drafts are payable, and that the custom must control the construction of the contract.

"We are not satisfied that either of these propositions "is sound.

"The language of the endorsement is without ambiguity and needs no explanation, either by parol proof or "by resort to usage. The plain meaning of it is that the "acceptor of the draft is to pay it to the endorsee for the "use of the endorser. The endorsee is to receive it on "account of the endorser. It does not purport to transfer the title of the paper or the ownership of the money "when received. Both these remain, by the reasonable "and almost necessary meaning of the language, in the "endorser. It seems to us that the court below correctly "construed the effect of the endorsement to be to make "White the agent of the bank for the collection of the "money.

"If this be a sound view of the legal effect of the "written endorsement, neither parol proof nor custom can "be received to contradict it."

In *Mechanics' Bank* v. *Valley Packing Co.*, 70 Mo., 643, the opinion of the Supreme court is very short, referring to and approving the opininion of the St. Louis Court of Appeals, reported in 4 Mo. Apl. cases, 201, where the facts fully appear. The case arose in St. Louis Circuit court, where judgment was rendered against the appellant, which was affirmed by the Court of Appeals, and the decision of that court was in turn affirmed by the Supreme court. The facts are briefly these:

The Mechanics' Bank brought suit against the Valley Packing Company, upon a draft drawn by the latter, addressed to Levi Ashbrook & Co., and payable to the order of Joseph C. Hull, cash., for $40,000. The draft was endorsed: "Pay James T. Harvenstein, Esq., "cashier, or order, for collection for account of First "National Bank, St. Joseph, Mo. Jos. C. Hull, cashier." After being thus endorsed, the draft was sent to Ashbrook & Co., who accepted it and took it to the appellant bank, where it was discounted by the latter at the full value. At the time the draft was discounted the special endorsement was erased by Ashbrook & Co., the acceptors, with the knowledge of appellant. It was claimed by appellant, and proof was offered tending to show that Ashbrook was the agent of respondent; that the whole snm paid by appellant for the draft was paid to respondent; that the special endorsement did not control the character or title to the draft, under all the facts of the case, and that appellant could recover notwithstanding the restrictive endorsement.

The Supreme court, in affirming, says (p. 644): "The "Court of appeals held that plaintiff could not, by parol "evidence, show the alleged contract between Ashbrook and the Valley Packing Company—that the en"dorsement by Hull was restrictive and destroyed the "negotiability of the bill and operated as a mere au"thority to the banker at St. Louis to receive the pro"ceeds of the bill for the use of the drawer—and that "the erasure of Hull's endorsement, without the assent "of the Valley Packing Company, destroyed the validity "of the draft as to that company, and plaintiff was bound "to know that such was its effect when it discounted the "bill. The case is reported in the 4th vol. of the Court "of appeals reports, 200, and the opinion of that court so "satisfactorily disposes of the questions involved in the

" case as to render any further comments by us unneces-
" sary."

There the acceptor of the bill had done just what, in effect, the court is asked to do or sanction in the case at bar, to wit: erase the special or restrictive endorsement. That endorsement was by the bank with whom the drawer had placed the draft, the same as in the case at bar.

The *legal* title to the drafts in question was not in the plaintiff below when this suit was instituted. Of this there can be no question, provided the endorsements are to stand as they appear upon the drafts and in the record. Unless the written contract is to be altered, contradicted and the effect varied by parol evidence, the legal title to the drafts was in the Canton bank not only when this suit was instituted, but is so still. The special endorsement, signed by Heald, cashier, did not transfer the legal title to the plaintiff.

The party having the legal title to a promissory note or draft must sue in his own name, and the legal title must be vested in the plaintiff at the time the suit was instituted. This is the settled law in Illinois.

The case of *Burnap* v. *Cook*, 32 Ill., 169, was upon, and against the maker of, a promissory note. The payee had indorsed the note in blank and sold it to one Miller. Miller, not wishing to sue in his own name, requested Cook, the plaintiff, to allow the suit to be brought in his name. To this Cook assented, and the blank endorsement was filled up by writing over the endorser's name, " Pay to William C. Cook." The plaintiff, Cook, had no other interest in the note. The defendant plead the general issue ; assignment after maturity; failure of consideration; and a plea, verified, denying that the payee assigned the note to the plaintiff. Judgment for the plaintiff below and the defendant appealed. Mr. Justice WALKER in delivering the opinion of the Supreme court, affirming, said (p. 171):

" This court has repeatedly held that the party having " the legal title must sue in his own name. It may, in " fact, be regarded as the settled doctrine of the court. " The doctrine has been uniformly maintained and generally acquiesced in for such a length of time that it " should not now be disturbed. As far as the interest of " the debtor is concerned, it matters little in whom the " equitable or beneficial interest may be vested. That is " a question between the holder and beneficiary. The " rule is equally well recognized that the legal title to an " instrument must be vested in the plaintiff at the time " suit is instituted. Where a party, by purchase and delivery, has acquired a note by a general assignment, and " sues upon it, it is held that he may fill in the endorsement to himself at any time previous to reading it in " evidence on the trial. But if the legal title is vested in " another when suit is commenced, the plaintiff cannot " afterwards invest him with the legal title, so as to maintain the action.

" A party holding a bill or note with a general assignment is presumed to be the legal owner of the instrument, and may fill the endorsement to himself at any " time. But when the endorsement is special, he has no " right to strike it out and write another to himself, over " the name of the assignor, because the legal title had " already vested in the assignee named in the endorsement thus stricken out. But, in any event, the defendant has the right to have a judgment rendered against him "in favor of the legal holder, so as to become a bar to a "future recovery on the same instrument.

"In this case the assignment seems to have been complete, and the legal title to the note vested in the plaintiff at the time this suit was instituted. It is not a question that affects the rights of these parties, whether any "or what consideration was paid for the note by plaintiff "below. The equities between the defendant in error "and his assignor do not concern the plaintiff in error. It "appears, from the evidence, that the payee sold the "note to Orrin Miller, and endorsed it in blank and delivered it to him. This was proof of title in Miller, "or any person who afterwards became the holder by "purchase or delivery from the holder. The assignment "was filled up with Miller's knowledge and consent, and "was properly received in evidence."

The general rule laid down in these cases by this court seems to be too well established to admit of doubt. As stated in *Brown* v. *Wiley*, *supra*, and *Martin* v. *Cole*, *supra:* "Some precedents to the contrary may be found in "some of our states, originating in hard cases, but they "are generally overruled by the same tribunals from "which they emanated, on experience of *the evil consequences flowing from a relaxation of the rule.*"

The defendant in error is the endorsee under this special endorsement. By that endorsement it was made the agent to collect the drafts for the Canton bank. It cannot recover from plaintiffs in error unless it be permitted, by parol evidence, to "vary, qualify, contradict" *and* "subtract from" this special endorsement. The judgment of the court below must be reversed, or all "the evil con-

"sequences flowing from a relaxation of the rule" must follow.

The same general doctrine, *i. e.*, that a writing endorsed on a note or draft cannot be varied by parol proof, is frequently held, and in most of the states. The rule is otherwise tersely stated that the paper "shall tell its own "story."

*Beattie* v. *Browne*, 64 Ill., 361.
*Skelton* v. *Dustin*, 92 Ill., 52.
*Bank v. Caverly*, 7 Gray, 220.
*Howe* v. *Merrill*, 5 Cush., 82.
*Campbell* v. *Robbins*, 29 Ind., 272.
*Dale* v. *Gear*, 38 Conn., 17.
*Charles* v. *Dennis*, 42 Wis., 57.
*Dixon* v. *Clayville*, 44 Md., 578.
*Woodward* v. *Foster*, 18 Gratt., 204.

Whether or not the Canton bank could have recovered judgment against Bell & Co. upon their drafts cannot be here considered for the one sufficient reason, without regard to any others, that the evidence upon that question was excluded from the case. While there are facts shown by the evidence which would bear upon that question, yet the court below excluded evidence offered by defendants, tending to establish the fact that the Canton bank could not recover. The theory and rulings of that court (to which exceptions were duly preserved) were that it made no difference what defense defendants had against the Canton bank, it could not be admitted in evidence in this case. After several rulings to that effect it was useless to offer further testimony upon that question.

That defendants had such a defense in the opinion of the Canton bank and the Chicago bank, is shown by what may be termed, perhaps not improperly, a conspiracy entered into between these two banks to hold Bell & Co., and cut off their defense, if possible. Plaintiffs in error claim that it was in pursuance of this conspiracy that this suit was brought by the Chicago bank instead of by the Canton bank, and that the same has been prosecuted and supported mainly by the partisan testimony of the same persons who made the arrangement. This reference to a conspiracy is not made upon mere snspicion, but is supported by the evidence. Let us see.

October 7, 1878, Gage, cashier of, and a principal witness for, defendant in error, wrôte to the Canton bank as follows: " Unless satisfactory adjustment of your liability, " as endorsed on Humphrey Bell & Co. is made at once, " *we shall be obliged to commence action thereon.* We " dislike to address you in these terms, but this matter " must be closed up. We see no reason why you should " not pay, and think the indulgence already shown should " insure prompt action by you." (Rec., 166-7.)

To this Mr. Heald, also a principal witness for defendant in error, replied October 14, 1878, stating:

" We are *unable to persuade* Bell & Co. to comply with " your demand, and *in case we* voluntarily *reimburse you*, " as demanded, a *new complication enters* into the case, " which may seriously affect *our* position."

" We have *one request and proposition* to make you. " Will you bring your suit *against Bell & Co. direct*, upon " *our entering into* an *agreement* to cash your judgment " and *take an assignment* of it *immediately* upon its being " secured? " (Rec., 167.)

Mr. Gage turned this letter from Heald over to his attorneys, who reply under date of October 15, 1878, saying:

"Mr. Gage has handed us your letter of yesterday for "attention and answer.

"The plaintiff is willing, at your request, to sue Bell "& Co. directly, your bank giving it a bond with two "good sureties that it will cash the judgment vs. Bell "& Co. upon its entry, and will pay one-half the costs and "expenses of the suit, the only object of our bank in thus "bringing the suit being to accommodate you, save half "the costs and get the assurance of your obligation to "take up the judgment. * * * *Mr. Gage wishes to "be of service to your bank, if he can.*

"If you wish to have us sue under such conditions, let "us hear from you and we will prepare the bond and will "*wish to have you put us in the way of finding Bell & Co. "for service of process in this United States District*, if "they or any of them are in the habit of coming here." (Rec., 168.)

To this Mr. Heald replies, October 17th:

"*Gage's kindness is appreciated.* Conditions named by "you satisfactory. You can prepare bond. Bell is fre-"quently in your city. *We can advise you by telegram of "any visit there, so that you can obtain service upon him as "you desire.*" (p. 168-9.)

To this the attorneys reply, October 18th:

"In answer to yours of yesterday, we send you form of "bond. When you *notify us that Bell is coming*, give us "all the information you can, *as to where he stops*, *who he* "*has business with, so that we may be sure to get ser-* "*vice on him or some other member of the firm.*

"If we serve one here, we can then serve others in their "own district." (p. 169.)

To this Mr. Heald replied October 21st, stating:

"Bell will likely have to go to Chicago soon to arrange "for disposing of their bills, as they are about to resume "packing *and we decline to negotiate more of their bills for* "*them.* He will likely consult with Mr. Kent, who is "known at plaintiff's, though perhaps it *would not be safe* "*to advise him of your design, for he is a warm friend of* "*Bell's.*" (p. 169.)

October 31st, the attorneys write to Heald:

"On receipt of yours of yesterday, we commenced suit "against Bell & Co., and have been *trying to-day to get* "*service on Whitnah at Stock Yards, but think he must* "*have sold out at Peoria.*

"We now commence suit in Southern District of "Illinois also to get service there, if impossible to do so "here. *Advise us of the coming of any member of the* "*firm to this neighborhood.*" (p. 170.)

Canton, Illinois, where defendants below reside, is in the Southern District of Illinois, while this suit was commenced in the Northern District, the residence of plaintiff below.

November 7th attorneys write to Mr. Heald, saying:

"We take the liberty of *reminding you* that *we wish to* "*be notified at once of the visit of any member of the firm* "of Humphrey Bell & Co. *to this neighborhood, even* "*though they should be served previously in your district·*

"*On getting service here we can dismiss there and prose-*
"*cute in our own court. . A description of person might*
"*assist us.*" (page 171.)

The bond furnished by Heald and the Canton bank is in the penal sum of $15,000, in the condition of which it is recited:

"*Condition* of which is *that plaintiff, at the request of*
"*Canton bank, is to bring suit against Bell & Co.* upon
"the drafts in question; and that, if plaintiff recovers a
"final judgment upon the drafts against Bell & Co.,
"bondsmen shall thereupon purchase such judgment of
"plaintiff at the full face value thereof, and interest and
"court costs, and pay one-half of plaintiff's attorneys' fees
"and expenses," and provides that such suit and such bond shall not discharge the Canton bank. (page 171.)

This correspondence and bond clearly establish a combination or conspiracy between the defendant in error and the Canton bank and Heald, its cashier, to have the Chicago bank sue Bell & Co. upon the drafts, so as to cut off, if possible, any defense which could have been made by them if sued by the Canton bank, and to prosecute them in a foreign jurisdiction, away from their home, where it would be much more vexatious and expensive to them. And it is in such a case that this court will be asked to overrule long and almost universally established precedents, or to adopt some forced construction, in order that defendant in error may recover, and thus the conspiracy bring success, and plaintiffs in error suffer unjustly as a consequence. This is not one of the "hard cases," wherein justice would be attained by establishing a bad precedent. On the contrary, it is one of those cases where justice will be done by adhering to the well established precedents. The written contract, the drafts and the indorsements are all in writing, and should "tell their own story."

Not only are the drafts and the indorsements in writing, but they were remitted by post, accompanied by letters in writing. Heald had no negotiations with the Chicago bank as to these drafts prior to the time of non-payment, except by letter. The letters remitting the drafts, like the indorsement on the drafts, were "for collection and credit." (page 103.) Plaintiff below, to carry out the scheme arranged between its cashier and Heald, must explain the letters also. Hence, Mr. Heald is called upon as a witness to state that the letters do not mean what they say, but to swear that the letters were in part printed, and that the words "collection and credit" *should have been* stricken out, and the word "sale" *inserted* instead. (page 103.)

The holder of commercial paper has a right to put over a blank endorsement certain special endorsements—such as are in accordance with the facts. It appears that the drafts in question were at first endorsed by Bell & Co., in blank and that before this suit was brought plaintiff below wrote over the blank endorsement the words, "Pay to the First National Bank of Canton, Ill." This they had the right to do, and they knew that that was in accordance with the facts. This was their statement at that time, in writing, as to what the facts were. It does not, however, follow that the right exists, to strike out or change a special endorsement after it is once placed on the note or draft. There is no such right. The endorsement thus placed there must remain. When this special endorsement was written over the name of Bell & Co.

the parties had not, evidently, examined the matter in all its bearings. When they came to strike out in effect the restrictive endorsement by the Canton bank, they desired to explain away the special endorsement written over the name of Bell & Co. In order, therefore, to force a judgment in the trial court they seek to change both the endorsements upon the drafts and also the letters in which they were written—and this is permitted by the trial court. Upon what principle of law or justice this wholesale contradiction and alteration of written contracts can be sustained or justified we must leave to others to explain—we are unable to do so.

The drafts and the endorsements are all in writing—this will, of course, be conceded; they are unambiguous—this cannot be successfully controverted; hence they cannot be altered, contradicted or their effect varied by parol proof.

## IV.

### STATUTORY DAMAGES SHOULD NOT HAVE BEEN ALLOWED.

The section of the statutes of Illinois, under which what was termed statutory damages are allowed, is as follows:

" That whenever any bill of exchange drawn or en-
" dorsed within this state, and payable without the limits
" of the United States, is duly protested for non-accept-
" ance or non-payment, the drawer or endorser thereof,
" due notice being given of such non-acceptance or non-
" payment, shall pay said bill, with legal interest from the
" time such bill ought to have been paid, until paid, and

"ten per cent. damages, in addition, together with the "costs and charges of protest."

Rev. Stat. of Ill., 1881, Ch. 98, Sec. 1, p. 747.

Damages allowed under this statute are in the nature of a penalty. They are in addition to interest. In the case at bar, *ten per cent.* upon the amount claimed to be due upon the drafts, was added and included in the judgment besides interest in full. (P. 182.) This being in the nature of a penalty, and in derogation of the common law, the statute must be strictly construed.

In addition to the fact presented above, that the drafts were not "duly protested," the further fact must appear affirmatively of "due notice being given of such non-ac"ceptance or non-payment" to the party against whom the penalty is sought. That part of this section of the statute which provides that upon the draft being "duly protested" the endorser and drawer shall be liable, is but declaratory of the common law. That result would follow without this provision of the statute. In providing a penalty the legislature has added that "upon due notice "being given" to the party, then "ten per cent. damages "in addition" to interest and costs shall be paid. A draft would be "duly protested" so as to enable the legal holder and owner to recover upon the same against all the members of a firm, which was drawer or endorser, by sending notice to the firm, and which was received by one of the members of the firm. This would be "duly protested" under the statute, and at common law so as to authorize a recovery upon and for the amount of the draft and interest and costs. The addition to the words "duly protested" of the words in the statute, "due notice being given," etc., would be mere surplusage. A draft could not be "*duly* protested" without notice being sent by the protesting officer. This is not, however, the "due notice" contemplated by the statute where a *penalty* is sought. A penalty can be inflicted upon the person only upon actual notice.

"*Due* notice" was never given to either of the Whitnahs. They never heard of the drafts or of any pretended protest thereof, for months after the drafts matured, nor until about the time (pp. 140 and 147); or until some time after (p. 110) this suit was commenced.

But even if plaintiff below was entitled to recover upon the money count (which is not conceded), still it could not recover statutory damages under that count. Such damages can only be recovered where there is a recovery upon the draft as such—as a definite commercial contract after being "duly protested" and upon "due "notice being given."

*Hambro* v. *Casey*, 110 U. S., 216–17.
*White* v. *National Bk.*, 102 U. S., 657, 662.

No penalty can be legally recovered or allowed in a *quantum meruit* judgment. No authority need be cited upon that question.

It is respectfully submitted that statutory damages should not be recovered in the case—either upon a proper construction of the statute in connection with the facts appearing in the record—or upon the money count—and that the trial court erred in including such a penalty in its finding and judgment.

## V.

### INCOMPETENT TESTIMONY WAS ADMITTED FOR PLAINTIFFS, AND COMPETENT EVIDENCE, OFFERED BY DEFENDANTS, WAS EXCLUDED UPON THE TRIAL.

Quotations from the record are necessary to present this point, so that there may be a clear understanding of the rulings complained of. In each instance quoted, objection was made in apt time, and exception duly entered and preserved in the record.

Witness Heald, cashier of the Canton bank, called by plaintiff, is under examination.

"Q. When you sent these drafts to plaintiff, was the "special endorsement over the signature of Humphrey "Bell & Co. then written thereon?" (p. 101.)

"Q. I will ask you whether those three drafts were "*in point of fact* sent by your bank to the First National "Bank of Chicago for collection on account of the First "National Bank of Canton?"

"Q. Do you know the fact whether it was sent for "collection, or not?" (p. 102.)

Each of these questions the witness was permitted to answer, although objected to.

The witness then stated that he "had no correspondence "or conversation with the plaintiff, except the letters in "which the drafts were forwarded to plaintiff, nor any "arrangement with plaintiff about these drafts, except as "he sent them forward by letter."

Letters enclosing drafts were then read in evidence, stating that he "enclosed for collection and credit" said drafts, the words, "for collection and credit," being printed in the letter form.

"Q. Now you stated yesterday that these drafts were "sent to the First National Bank of Chicago for sale; I "will ask you to explain why, in these endorsements or "in these letters the words 'for collection and credit' are "used?" (p. 103.)

"(Objected to; overruled; exception, and witness "answered.)"

The plaintiff offered in evidence the drafts and the papers, identified as certificates of protests which were objected to. (p. 105.)

Lyman J. Gage, cashier of plaintiff, is called by plaintiff, as witness:

"Q. How came these drafts to be sent to your bank, "if you know?

"A. I suppose I know. Some time previous to these "drafts Mr. Boulton, who has the more immediate charge "of these foreign drafts, came to my desk and informed "me."

At this point attorneys for defendants objected to witness stating what Mr. Boulton or others had told him. Objection overruled, and witness proceeded to state what Mr. Boulton told him.

Defendants' attorneys also objected to witness stating what he said to Mr. Boulton; objection overruled, and witness proceeded to state what he told Boulton. (p. 114.)

"Q. What was the nature of this transaction, so far "as the First National Bank of Chicago was concerned? "In other words, did you receive these drafts for collection on account of the First National Bank of Canton?"

(Objection; overruled; question answered.)

"Plaintiff's attorney then asked witness whether these "drafts were purchased by the First National Bank in "the due course of business, or rather in pursuance of "the arrangement made with defendants, or with the representative of defendants." (p. 116.) (Objection; overruled, and the witness allowed to answer.)

To the witness Monroe Willard:

"Q. State, if you know, when the special endorsement over the signature of Humphrey Bell & Co., "which is in the following words: 'Pay First National "Bank of Canton, Illinois, or order,' was put on, and by "whom?"

(Objection; overruled, and witness allowed to answer.) (p. 131.)

There are several reasons why this testimony was incompetent and improperly admitted. In the first place the purpose, intent and effect was to contradict, vary and substract from the written contracts. As we have shown, the best and highest authorities establish the rule, that the paper "must tell its own story." In the case at bar the paper was not left to "tell its own story." The witnesses were permitted to directly impeach and contradict both of the endorsements upon the drafts, and also the letters remitting the same to defendant in error. If such testimony is properly admissible, what becomes of the rule that written contracts must speak for themselves when unambiguous? Where will the line be drawn? If a part of the contract may be thus varied and changed by parol testimony, why not the whole contract? Is the commercial world to be set afloat upon a sea of doubt and uncertainty as to what the commercial paper means which they are called upon to handle—that its legal meaning and effect depends upon what some negligent agent may say he understood it to mean?

Again, Mr. Heald is asked whether "*in point of fact*" the drafts were sent for collection. Even upon the theory that the contract contained in the endorsements and the letters remitting the drafts could be changed by parol testimony, this question was manifestly wrong. The very question to be decided would then be, whether "in "point of fact" they were sent for collection. Any proper or fair ruling would limit the witness to a statement of what the facts and circumstances were within his knowledge, and leave the court and jury to determine, upon all the testimony in the case, whether "in point of fact" the drafts were sent for collection. This interrogatory leaves it to the witness to determine an issue in a case from the standpoint of what he may personally know of the matter, instead of leaving it to be determined by the proper persons upon all the facts as developed in the case by the testimony of witnesses, and upon the written evidence.

Mr. Heald is also asked "to explain why, in these "endorsements, or in these letters, the words 'for collection "and credit' are used." Upon what theory or rule of evidence, or of justice, can such an examination be sustained? This witness is allowed, in order to shift the burden of a heavy loss, caused by negligence, from his own shoulders or that of his bank, and after entering into a conspiracy to cast that burden upon parties perfectly innocent of any negligence, to explain his reasons, or to give his "why," for the purpose of altering these plain and unambiguous contracts, and of impeaching the language of his own letters.

And Mr. Gage is allowed, while being examined in his own behalf, to enter somewhat in detail into a conversation between himself and Mr. Boulton, stating what he told Mr. Boulton, and what Mr. Boulton told him, when neither of the defendants was present. Why is this allowed? Mr. Gage is not an adverse or unwilling witness by any means. Mr. Boulton is accessible—is examined as a witness, and is entirely competent to state the arrangement, if any, made between him and defendants. Is this fair? Is it just? Can it be sustained by any rule of evidence?

Mr. Gage is also asked, "What *was the nature* of this "transaction? * * * In other words, did you receive "these drafts for collection?" and, "whether these drafts "were *purchased* * * * in the *due course* of business, or rather *in pursuance* of the arrangement made "with defendants?" What is left for the court or jury to do, after Mr. Gage settles the question as to "the nature of this transaction," and that the drafts were "purchased * * * in the due course of business," but simply to enter his conclusions as the verdict and judgment? Gage is here asked simply for his conclusions, not for the facts. He never met or conferred with either of the defendants, by letter or otherwise, in regard to the matter until long after the drafts had come to his bank. That there ever was any arrangement of any kind between defendants and Gage's bank as to these drafts is denied; certainly there was none in writing, except the drafts themselves. He ought not to be permitted to give, in effect, a legal interpretation of an alleged interview by stating that he *purchased* the drafts "*in pursuance*" thereof.

On the other hand, what were the rulings as to testimony offered by defendants?

The witness Heald being recalled, in answer to defendants' attorney, stated that he received a letter from plaintiff which stated that the Turner draft had been protested, and saw Mr. Bell the same day when there was a conversation between them.

" Q. In that conversation between you and Mr. Bell, " was anything said about the meats? "

" BY THE COURT: That is not admissible, any further " than to show that it resulted in sending this dispatch."

Witness continues: " Mr. Bell instructed me to tele- " graph plaintiff in response to their letter just the words " of that dispatch.

" Q. Was that all he said about those instructions, just " simply to give you those words?

" Q. Upon receipt of that letter, and your communi- " cation of the contents thereof to Mr. Bell, stating that " the first two Turner drafts had gone to protest, what, " if any, reply did he make? " (P. 180.)

The witness was not allowed to answer either of these questions.

Is this telegram, sent by Heald to Gage or the Chicago bank, evidence of a higher nature than his letter enclosing the drafts, or the drafts themselves? This same witness is allowed, against objection of defendants, "to explain "why, in these endorsements or in these letters the words "'for collection and credit' are used," but is not allowed to make any statements or explanations as to the language of this telegram. Mr. Heald had already testified in behalf of plaintiff below as to receipt of letters by him advising him of non-payment of drafts, and enclosing certificates of protest; that he had had interviews with Bell as to the same; showed them to him, etc. (pp. 104 and 105). Mr. Gage had testified as to receipt of telegrams from Heald in answer to those letters. Mr. Heald had just testified that Bell instructed him to telegraph "just the words of that dispatch," when he is asked on behalf of defendants, these two questions which he is not allowed to answer:

> "Was that all he said about those instructions, just "simply to give you those words?"
>
> "Upon receipt of that letter, and your communication "of the contents thereof to Mr. Bell, stating that the first "two Turner drafts had gone to protest, what, if any, reply did he make?"

If the Chicago bank had *purchased* the drafts, as is claimed, "in pursuance of an arrangement made with defendants," then Heald was the agent of the Chicago bank in this particular matter of notifying Bell of the protests and of obtaining instructions from him. Certainly he was not acting for Bell & Co. as their agent and in their interest in serving notice upon them and in obtaining their reply as to "what disposition shall be made of the property." On the other hand, if the drafts had been transmitted by the Canton bank to the Chicago bank for collection, as appears by the endorsements on the drafts and by the letters enclosing them, then the drafts were still the property of the Canton bank.

If Heald was then acting as agent of the Chicago bank, Bell's instructions to him were competent evidence. If Heald's bank was then the owner of the drafts, surely Bell's instructions to him were competent. In either event Heald should have been required to answer these questions.

Defendant Bell testified (p. 173):

" It was perfectly understood between Mr. Heald and " myself that the meats represented by the bills of lading " were not to be given up. Had drawn other drafts in " the same manner with Mr. Heald. Had done so with " Ingersoll and Bell. That firm lasted about a year."

Witness was then asked:

" Q. Had any of the meats or goods represented by " the bills of lading ever been given up, to your knowl" edge?"

" Q. Had Mr. Heald or the bank which he repre" sented, to your knowledge, ever authorized the giving " up of any of the meats represented by the bills of lading " that were attached to the drafts?" (P. 174.)

" Q. Was there any conversation between you and " Mr. Heald after this notice to you of the protest on the " part of the bank as to the goods being given up?" (P. 176.)

Witness states " there were other drafts drawn after " the formation of the firm of Humphrey Bell & Co. " like those in question, with bills of lading attached."

"Q. Were they paid out of the proceeds of the "meats?" (P. 177.)

"Q. Had Messrs. Whitnah or either of them any "knowledge of the drawing of these drafts?"

"Q. Did Mr. Heald confer with the Messrs. Whitnah "before accepting these drafts or paying money on "them?"

"Q. Were the individual signatures of either the "Messrs. Whitnah furnished the First National Bank of "Canton upon or in connection with these drafts?" (P. 178.)

Witness was not allowed to answer any or either of the above questions.

Bell had drawn numerous other drafts, both by Ingersoll & Bell and Humphrey Bell & Co., "in the same "manner with Mr. Heald," and other drafts of Bell & Co., with accompanying papers, had been sent by Heald to the plaintiff, the same as these were. The questions just quoted were proper, under the circumstances and facts in this case, to show the course of dealing between the same parties. Suppose it had been the custom or usage in regard to the former drafts to surrender the meats, and that Bell had been cognizant of that fact, and that plaintiff had offered to prove that to be the fact. It would have been competent for plaintiff to make such proof. If the reverse of that be true—if the custom or usage was *not* to give up the meats—why is not proof of that fact equally competent?

## VI.

### CONTROVERTED QUESTIONS OF FACT MUST BE SUBMITTED TO THE JURY UNDER PROPER INSTRUCTION BY THE COURT AS TO THE LAW. THESE QUESTIONS WERE, IN THIS CASE, ALL TAKEN FROM THE JURY AND A FINDING ENTERED BY THE COURT.

The constitutional right of trial by jury has not been formally taken away, although plaintiffs in error respectfully submit that this has been done practically, in the case at bar. Feeling this as they do, very keenly, they desire to submit this question to this honorable court, and that what they feel to be a great wrong to them may be righted, if their views are correct.

What is a question of fact? This court answers that question so far as is important, upon one point in this case, very concisely, in *Railroad Co.* v. *Bank of Ashland*, 12 Wallace, 227, 231, where it is stated that: "Surely "the question whether a negotiation of bonds was a sale "or a loan is ordinarily, and *prima facie*, a question of "fact. To make it a question of law, some fact must be "admitted or proved, which is irreconcilable with one "conclusion or the other."

There is no fact admitted or proved in the case at bar to make it a question of law under the rule thus laid down by this court. The negotiation of the drafts by which they passed to the defendant in error was a sale or a transfer for collection. No fact is "admitted or proved "which is irreconcilable with one conclusion or the other."

It is as clearly and as purely a question of fact as was ever presented in a court of justice.

The citation of a very few cases decided by this court, will serve to present the law upon the question now under consideration as at present determined, and also to show the growth of and the reasons for the present rule.

In *Tracy* v. *Swartwout*, 10 Peters, 80, 95, this court say:

"A court may not only present the facts proved in "their charge to the jury, but give their opinion as to "those facts for the consideration of the jury. But as "the jurors are the triers of facts, such an expression of "opinion of the court should be so guarded as to leave "the jury free in the exercise of their own judgment. They "should be made distinctly to understand that the instruction was not given as a point of law by which they were "to be governed, but as a mere opinion as to the facts and "to which they should give no more weight than it was entitled to; and if a fair construction of the charge complained of should amount to no more than this, it is "liable to no valid objection."

Such is not according to the rule as now laid down in the State of Illinois. In a case decided this year, *C. & N. W. Ry. Co.* v. *Moranda*, 108 Ill., 582, the Supreme court say: "Under our practice it is not admissible for the court "to express any opinion to the jury on questions of fact. "* * Where there is evidence before a jury upon "which it is legally admissible, there may be difference of "opinion, it is error to allow any opinion of judge or "court to be obtruded upon the jurors to influence their "determination."

In *Greenleaf* v. *Birth*, 9 Peters, 292, 299, this court say:

"The counsel for the plaintiff further prayed the court "to instruct the jury that the 'evidence was not sufficient to prove that the said contract between Morris, "Nicholson and Greenleaf on the one part, and W. "Stewart on the other, had been annulled or rescinded "between the parties at any time prior to the execution "of the deed by the plaintiff and Morris and Nicholson "in May, 1796.'

"If this instruction be considered as asking the court to "determine on the effect of the evidence, it was properly "refused. It is the province of the jury to weigh and decide on the sufficiency of the evidence, and from the "words of the instruction it would seem to be conceded "that there was some evidence of the rescission of the contract, as the court were asked to instruct the jury that "the evidence was not sufficient to prove the fact.

"Where there is no evidence tending to prove a particular fact, the court are bound to so instruct the jury when "requested, but they cannot legally give any instruction "which shall take from the jury the right of weighing "the evidence and determining what effect it shall have. "In this view the Circuit court did not err in refusing "the above instruction."

In *The Improvement Company* v. *Munson*, 14 Wallace, 442, 448, this court say:

"Nor are judges any longer required to submit a question to the jury merely because some evidence has been "introduced by the party having the burden of proof, unless "the evidence be of such a character that it would warrant "the jury in finding a verdict in favor of that party.

"Formerly it was held that, if there was what is called a "*scintilla* of evidence in support of a case, the judge "was bound to leave it to the jury, but recent decisions "of high authority have established a more reasonable "rule, that in every case before the evidence is left to the "jury, there is a preliminary question for the judge, not "whether there is literally no evidence, but whether there "is any upon which a jury can properly proceed to find a "verdict *for the party producing it*, upon whom the onus "of proof is imposed."

The case last cited is approved upon the point presented by this court in *Pleasants* v. *Fant*, 22 Wallace, 116; 120, 21, where this court also say:

"In the case of *Parks* v. *Ross*, this court held that the "practice of granting an instruction like the present had "superseded the ancient practice of demurrer to evidence, "and that it answered the same purpose, and should be "tested by the same rules; and in that case it said the "question for the consideration of the court was, whether "the evidence submitted was sufficient to authorize the "jury in finding the contract set up by plaintiff. * * * "It is the duty of the court in its relation to the jury to "protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse "of passion or prejudice, and from any other violation of "his lawful rights in the conduct of a trial. This is "done by making plain to them the issues they are to "try, by admitting only such evidence as is proper in "these issues, and rejecting all else; by instructing them "in the rules of law by which that evidence is to be examined and applied, and finally, when necessary, by setting aside a verdict which is unsupported by evidence, "or contrary to law.

"In the discharge of this duty, it is the province of "the court, either before or after the verdict, to decide "whether the plaintiff has given evidence sufficient to "support or justify a verdict in his favor, not whether on "all the evidence, the preponderating weight is in his favor, "that is the business of the jury, but, conceding to all the "evidence offered the greatest probative force which, ac"cording to the law of evidence, it is fairly entitled to, is "it sufficient to justify a verdict?"

And this practice is now approved, although by a divided court in Illinois, in *Simmons* v. *C. & T. R. R. Co.*, 110 Ill., 346.

It is not claimed to be the law now that where a *scintilla* of evidence is offered by the party upon whom the *onus* of proof is imposed, that, therefore, the case must be submitted to the jury. The law, as now applied, is concisely stated by this court to be that trial courts are not required to submit a question to a jury "merely be"cause some evidence has been introduced by the *party* "*having the burden of proof*, unless the evidence be of "such a character that it would warrant the jury in find"ing a verdict *in favor of that party*." This is substantially the construction of that article of the constitution guaranteeing a trial by jury. But this rule of practice defines the limit to which the trial court may go. It is a restriction or limitation by which the trial court should be controlled.

The rulings of the court below in the case at bar were not within this rule—they cannot be sustained by any settled and authoritative rule to be found in the books.

Under the theory adopted by the trial court, that the written contracts—the endorsements upon the drafts—could be explained, varied and contradicted by parol proof, it became an important fact to determine whether the Chicago bank purchased the drafts or received them for collection. Upon this question of fact, Mr. Heald testified that Bell instructed him in the fall of 1877 to send their drafts to plaintiff for sale, as he had some arrangement with the plaintiff to have said drafts sent directly there for sale (p. 101), and that he sent them to plaintiff for sale for defendants (p. 102). Mr. Gage testified that the drafts were received in pursuance of an arrangement made with Bell, or some one representing defendants, as communicated to him by Mr. Boulton, one of his employes, for their purchase (pp. 114 and 115), and that he did not receive them for collection but bought them, paying their full equivalent (p. 116). Mr. Boulton testified that some months prior to March, 1878, he had a conversation with Bell "or with parties who introduced "the subject to me on his account,"—Mr. Foster or Mr. Griggson—whom he informed that being "out of town" drafts they would not care to purchase them without a bank endorsement (p. 132), and that he afterward bought the drafts in question (p. 133). He does not state that either Bell or any person pretending to represent defendants assented to his proposal or agreed to sell the drafts to him or his bank, and says, "I know of no "other arrangement about these bills than that I have "already stated." This was all the testimony offered by plaintiff as to the *purchase* of the drafts. Had the defendants deemed it justifiable they could then have moved the court to instruct the jury to find a verdict for defendants. The *onus* being upon the plaintiff, this would have been the proper place at which to present the question of whether it had introduced evidence which, uncontradicted, was sufficient to warrant a finding for plaintiffs. But defendants introduced contradictory evidence.

In addition to the fact that the endorsements upon the drafts and the letters remitting them were all, and without any qualification whatever, "for collection and credit," and that they are in writing and unopposed by anything in writing, Mr. Foster testified that in summer of 1877 he saw Boulton about drafts and shipments by Bell; that at that time the firm was Ingersoll & Bell; that *at that time there was no such firm as* Humphrey Bell & Co., that he was aware of (p. 137), and that he was certain that this conversation was in the summer of 1877, between May and *September*. (p. 138.) (The firm of Humphrey Bell & Co. was formed the last of *November*, 1877.) Mr. Bell testified that prior to the drawing of the drafts in question, he never saw Mr. Boulton but once; that was in the *summer* of 1877; that he was with Mr. Griggson, who had business at the bank, and he, Bell, called with him casually, after they had dined together; that upon being introduced, Mr. Boulton said: "We have had "some of your drafts bought of other parties, and sug- "gested that they come direct, and not through another "bank"; that that was all the interview he had with Boulton; that he never had any interview with Mr. Gage in regard to their taking any draft; that *at the time* of the conversation with Boulton *the firm of Humphrey Bell & Co. had not been formed*, and no drafts had up to that time been signed in the firm name of Humphrey Bell & Co.; that the signature to the drafts, referred to by Boulton, was Ingersoll & Bell; that he never made any arrangement with anybody connected with the plaintiffs, at any time, in regard to their purchasing Humphrey

Bell & Co.'s drafts; and that no other person did so, to his knowledge or with his authority. (pp. 173-4.)

There is also this further and almost conclusive fact. There had been numerous items of expenditure by the Chicago bank, which it charged to the account of the Canton bank, and from time to time advised that bank of these items charged to its account (pp. 161, 162.) July 19, 1878, after the drafts had been returned from London to Chicago, the Chicago bank wrote to the Canton bank as follows: "I *charge your account* with Turner drafts "returned £2,450 sterling, with interest and expenses, "amounting to $12,108.98 for which please make reimbursement."

If the drafts had been *purchased* from Bell & Co. under an arrangement made directly with them, such a letter would not have been written. Why should they ask the Canton bank to *reimburse* them and make no call whatever upon Bell & Co.?

There is, then, upon this question the testimony on the part of the plaintiff upon whom the *onus* rests, of Mr. Heald, one of the cashiers, of Mr. Boulton, as to *what he said* to Mr. Bell or to some one claiming to represent Bell, he cannot remember which, but which, according to his own testimony, does not appear to have been consummated in any agreement, and of Mr. Gage, the other conspiring cashier, as to what Mr. Boulton told him. On the part of the defendants there is the testimony of the contract endorsed upon the drafts, of the letters of Heald, written at the time, of Mr. Bell, one of the defendants, that he made no arrangement whatever with Boulton or any one else for a sale of the drafts; and that at the time he saw Boulton there was no such firm in existence as Humphrey Bell & Co., drawers of the drafts, and of Mr. Foster, an entirely disinterested witness, who testifies that he is the person who had the conversation with Boulton; that it was in the summer of 1877, between May and September; that it related to Ingersoll & Bell, and that the firm of Humphrey Bell & Co. had not then been formed, and of Mr. Whitnah and others that the firm of Humphrey Bell & Co. was not formed until the last of November, 1877, and the letter of July 19, 1878, showing that the amount of the drafts and interest and expenses had been charged to the account of the Canton bank by the Chicago bank, and asking of the Canton bank reimbursement.

No argument could make it clearer that there was a contested and material question of fact, as to which the evidence was conflicting and contradictory, than to refer to the testimony as it appears in the record. All the cases sustaining the right of the court to take a case from the jury are upon the principle that, admitting the testimony offered by the party having the burden of proof to be true, still it is not sufficient to warrant or support a finding by the jury in favor of that party. None of the cases which have come under our observation, declare the right of the court to take a case from the jury, when the evidence is clearly conflicting upon an important question of fact, and thus usurp the power of the jury and decide the question of fact according to the opinion of the court as to the preponderence of the evidence. It is believed that no well considered case can be found, certainly none which would be followed, sustaining such action. And yet that is precisely what was done in this case.

"It is hardly necessary to say, that, if there was any "evidence tending to prove that the deceased was insane "when he took the poison which caused his death, *the* "*judge* was not bound to, and *indeed could not properly* "*take the evidence from the jury.* The weight of the "evidence is for them, and not for the judge to pass "upon."

*Insurance Co.* v. *Rodel*, 95 U. S., 233, 238.

"When a cause fairly depends upon the *effect or weight* "of testimony, it is one for the consideration and deter- "mination of the jury, under proper directions as to the "principles of law involved. It should never be with- "drawn from them unless the testimony be of such a "*conclusive character* as to *compel* the court, in the exer- "cise of a sound judicial discretion, to set aside a verdict "in opposition to it."

*Insurance Co.* v. *Doster*, 106 U. S., 30, 32.

The same rule is applied in

*National Bk.* v. *City Bk.*, 103 U. S., 668, 670.
*Manchester* v. *Erricsson*, 105 U. S., 347, 349.
*Insurance Co.* v. *Lathrop*, 111 U. S., 613, 615.

It has always been the rule in this country, that it is the province of the jury, when testimony of witnesses is contradictory, to consider the interest of the witnesses, if any, in the matter involved; their opportunity for knowing the facts; their bearing upon the stand; as well as all the other facts and circumstances in the case, and to determine from all these the real facts as to the question at issue.

We know of no just or valid reason for making this case an isolated exception to this universal rule. It could hardly be better characterized than to do so in the language of this court in *Barney* v. *Schmeider*, 9 Wal., 249, 252, in which case the trial court had instructed the jury to find a verdict for the plaintiff.

"It is obvious that if such a verdict can be supported "here, where the very act of the court in doing this is "excepted to and relied on as error, the trial by jury may "be preserved *in name, but will be destroyed in its es-"sential value, and become nothing but the machinery "through which the court exercises the functions of a "jury, without its responsibility.*"

As was done by the trial court in the case just cited, so in the case at bar the jury was instructed to find a verdict for plaintiff, although in the case at bar the court left nothing whatever to the jury, but they were directed peremptorily to render a verdict for plaintiff for a specified amount, "including ten per cent. statutory damages, which "was done accordingly," to which exception was duly entered. (p. 191.) The jury, under this instruction, had nothing whatever in fact to do with a finding; they never returned any verdict; it was all done by the court.

We have already suggested that whether the days of grace were included in the time named by the acceptor or not, is a question of fact. There is nothing upon the face of the writing itself which is ambiguous, calling for any legal interpretation. It is simply this, "Accepted, pay-"able at Messrs. Barclay & Co., bankers, London, *due* "*21 May.*" It is not here contended that parol evidence might not be received to determine the fact of whether or not the days of grace were included. But it is most seriously and earnestly contended that that is a question of fact for the jury. Like the question above presented, the *onus* of establishing it is upon the plaintiff. It being a question of fact, as to which there is no clear and uncontradicted evidence, it should have been submitted to the jury. The court might as well presume as a question of fact that the days of grace were not included, as to presume that they were; there is nothing in the language of the acceptance requiring a presumption or construction that they were included. Why not, therefore, presume from the fact that after the question had been raised and argued in court, both Turner, the acceptor, and the assistant manager of the London bank, who seems to have had this matter in charge, were examined as witnesses for plaintiff, and that they were, of all persons, the ones to know whether days of grace were included. Why not presume from these facts that the days of grace were not included? The court below should not have conclusively presumed this question of fact, but should have left it to the jury.

There are numerous other questions of fact which should have been submitted to the jury *under proper instructions and directions* by the court, such as:

Whether, under all the facts and circumstances, the London bank was the agent of plaintiff or of defendants.

Whether the property was held and disposed of by the London bank under the hypothecation papers or under the instructions contained in letters, telegrams and cablegrams.

Whether it was in fact intended by defendants by their instructions and telegrams to change or limit the terms or powers as to selling the bacon, and that this was so understood, accepted and acted upon by plaintiff.

Whether there was in fact negligence by the plaintiff or its agent, officers or employes, by reason of which loss accrued to defendants.

Whether the plaintiff in fact assumed control of the property, and placed it beyond control of the defendants; and

Whether there was negligence by plaintiff, or those acting for it, in leaving the proceeds of the property in the hands of a *factor* for several months, and that loss accrued to defendants by reason of such negligence.

## VII.

### THE FINDING AND THE JUDGMENT OF THE COURT BELOW ARE CONTRARY TO THE LAW AND THE EVIDENCE.

It is believed that it is shown conclusively in the foregoing argument and upon the authorities cited, that the finding and judgment of the court below are contrary to law in this:

*First.* In holding that the drafts were not prematurely protested.

*Second.* In finding that the City Bank of London was the agent of plaintiffs. The finding should have been that if the London bank was agent of plaintiffs in error in any sense, it was at most only as the common agent of the joint principals, the plaintiff and the defendants.

*Third.* The indorsements upon the drafts are unambiguous, and parol proof should not have been admitted to alter, contradict and subtract from them, and to vary their effect.

*Fourth.* In allowing statutory damages.

*Fifth.* In admitting incompetent testimony offered by plaintiff, and in excluding competent evidence offered by defendants.

*Sixth.* In refusing to submit to the jury controverted and material questions of fact; and

*Seventh.* In taking the case from the jury and assuming the functions and performing the duties of the jury.

We are aware of the fact, that as cases are ordinarily presented, this court does not review the evidence in a case for the purpose of passing upon the merits of the controversy. It is not intended here or now to enter into a review of the facts or an argument upon the general merits of the case, although we suppose that by reason of the court below taking the case from the jury, and itself passing upon the questions of fact, it would be proper so to do. It is sufficient for our present purpose to say, that we are most profoundly convinced that the real merits are with our clients. If, however, counsel for defendant in error should enter into an argument upon the merits, we will then feel justified in presenting the same fully.

Respectfully submitted.

O. H. HORTON,
HORTON, HOYNE & SAUNDERS,
*Attorneys for Plaintiffs in Error.*

O. H. HORTON,
*Of Counsel.*

Office Supreme Court U. S.
FILED.
JAN 27 1885
JAMES H. McKENNEY.
CLERK.

115-373

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IN THE

# Supreme Court of the United States,

OCTOBER TERM, A. D. 1884.

HUMPHREY BELL, ANDREW J. WHITNAH AND HIRAM A. WHITNAH,
*Plaintiffs in Error,*
*vs.*
THE FIRST NATIONAL BANK OF CHICAGO,
*Defendant in Error.*

Error to the Circuit Court of the United States for the Northern District of Illinois.

## BRIEF OF PLAINTIFFS IN ERROR,

UPON MOTION TO STRIKE FROM THE RECORD THE "CHARGE TO THE JURY."

O. H. HORTON,
ATTORNEY FOR PLAINTIFFS IN ERROR.

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BARNARD & GUNTHORP, LEGAL PRINTERS. 104 RANDOLPH STREET, CHICAGO.

IN THE

# Supreme Court of the United States,

OCTOBER TERM, A. D. 1884.

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|---|---|
| HUMPHREY BELL, ANDREW J. WHITNAH AND HIRAM A. WHITNAH, *Plaintiffs in Error*, *vs.* THE FIRST NATIONAL BANK OF CHICAGO, *Defendant in Error*. | **Error to the Circuit Court of the United States for the Northern District of Illinois.** |

## Brief of Plaintiffs in Error upon Motion to Strike from the Record the "Charge to the Jury."

This court, in *Carver* v. *Jackson*, 4 Pet., 1, 80, say: "We take this occasion to express our decided disapprobation of the practice of bringing the charge of the court below at length before this court for review. * * * "We trust, therefore, that this court will hereafter be spared the necessity of examining the general bearing of such charges."

This criticism has been several times repeated by this court, and in *Magniac* v. *Thompson*, 7 Pet., 348, 390, it is stated: "The whole charge of the court is spread

" upon the record, a practice which this court have uni-
" formly discountenanced, and which, we trust, a rule
" made at the last term will effectually suppress."
The rule there referred to we understand to be substantially the same as the present fourth rule.

In the record there appears in full a " Charge to the " Jury " (pages 192–208). The trial was concluded the 6th day of March, 1882 (page 84), and this " Charge to " the Jury " was filed April 5, 1882 (page 208). Hence no exceptions to the charge as here inserted appear in the record. The whole force and effect of the charge as to the questions involved in this court is concentrated into the one point of instructing that a verdict be entered in favor of the plaintiff for a definite amount, to which exception was duly entered (p. 191). The record is full and complete without this charge.

It appears from the affidavit filed with said motion that said charge was not inserted at large in the record by, or on the motion, or by the procurement of attorneys for plaintiffs in error, and was not prepared or filed by them.

The motion is therefore presented to strike said " Charge to the Jury " from the record.

For convenience, the motion and affidavit referred to are printed herewith.

Respectfully submitted.

O. H. HORTON,
*Attorney for Plaintiffs in Error.*

IN THE SUPREME COURT OF THE UNITED STATES, THE
OCTOBER TERM, A. D. 1884.

| | |
|---|---|
| Humphrey Bell, Andrew J. Whitnah and Hiram A. Whitnah, Plaintiffs in Error,<br>*vs.*<br>First National Bank of Chicago, Defendant in Error. | *Error to the Circuit court of the United States for the Northern District of Illinois.* |

And now come the plaintiffs in error, by O. H. Horton, their attorney, and move the court to strike from the record in said cause "charge to the jury," found in the record, commencing on page 192 and ending on page 208.

In support of this motion is filed herewith and attached hereto affidavit of B. M. Saunders.

O. H. HORTON,
*Attorney for Plaintiffs in Error.*

O. H. HORTON,
*Of Counsel.*

IN THE SUPREME COURT OF THE UNITED STATES, THE OCTOBER TERM, A. D. 1884.

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| Humphrey Bell, Andrew J. Whitnah and Hiram A. Whitnah, Plaintiffs in Error,<br>*vs.*<br>First National Bank of Chicago, Defendant in Error. | *Error to the Circuit court of the United States for the Northern District of Illinois.* |

STATE OF ILLINOIS,
NORTHERN DISTRICT OF ILLINOIS. } SS.

Burrous M. Saunders, being first duly sworn, deposes and says: That he was a member of the firm of Hoyne, Horton & Hoyne, attorneys in said cause for the defendants below, in the months of March and April, A. D. 1882, when said cause was tried in the Circuit court of the United States for the Northern district of Illinois, and when the bill of exceptions therein was filed in said last named court; that the "charge to the jury" now appearing in said record at page 192, as appears by the printed record, and as part of the bill of exceptions, was not embraced in said bill of exceptions, as the same was prepared by the attorneys for defendants below, and presented to the court below for approval; that said "charge to the jury" was not inserted in said bill of exceptions by or on the motion, or by the procurement of attorneys for defendants below—that there appears in said bill of exceptions now on file in said Circuit court, but after the words "defendants' attorneys then and there duly excepted," which were in the bill of exceptions as prepared and presented for approval by defendants' attorneys, and at or near the foot of page 191 of the record, as appears from the printed record of said Supreme court, the following words in the handwriting of the judge who tried said cause, to wit, "which charge of the court was as follows," after which is a star or margin mark; and in the margin is written in the handwriting of said judge the following words, to wit: "The clerk will here insert the charge of "the court filed herewith, marked A," and that said charge was not prepared or filed by attorneys for defendants below.

And further deponent saith not.

BURROUS M. SAUNDERS.

Subscribed and sworn to before me this 17th day of January, A. D. 1885.

[SEAL.] THOMAS M. HOYNE,
*Notary Public.*

115-373

JAMES H. McKENNEY

IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1885.

HUMPHREY BELL, ANDREW J. WHITEMAN
and HIRAM A. WHITEMAN,
*Plaintiffs in Error.*
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CHICAGO,
*Defendant in Error.*

Error to the Circuit
Court of the United
States for the Northern
District of Illinois.

## ARGUMENT FOR PLAINTIFFS IN ERROR IN REPLY.

O. H. HORTON.
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BARNARD & GUNTHORP, LAW PRINTERS, 44 & 46 LASALLE ST., CHICAGO.

IN THE

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## Argument for Plaintiffs in Error in Reply.

MAY IT PLEASE THE COURT:

The brief and argument for defendant in error contains what is termed a full "statement of the case," although there is no intimation that the statement of facts in the brief and argument for plaintiffs in error is any respect incorrect or incomplete.

In the brief for defendant in error it is stated (page 2) that: "The drafts, endorsements, etc., were offered in "evidence, and admitted *without objection*." The "etc." is no doubt intended to include the notary's certificate of protest, as that is the paper most intimately related to the drafts, and as the protest is mentioned in the next succeeding sentence. The statement that such papers were offered in evidence and admitted "without objection," has no foundation whatever in fact. It appears by the record that "plaintiff then offered in evidence the three drafts "sued upon," and the "certificates of protest."

"To the admission of these papers and each and every "one of them, defendants then and there objected, which "objection was overruled by the court and said papers "read in evidence to the jury; to the overruling of which "objection and the reading of said papers to the jury, "counsel for the defendants then and there duly ex-"cepted." (Rec., 105.)

This erroneous statement relates to too important a fact to permit it to pass unchallenged. If it were true that these papers were admitted in evidence without objection, such fact would materially affect questions of law involved. This flagrant error may be taken as an index of the rather colored and partisan statement of facts in brief for defendant in error.

Such coloring may be illustrated by the statement upon page 3 of brief, that "no objection is made to the de-"mand, protest and notice by plaintiffs in error, except "that they insist that demand and protest were prema-"turely made." This statement, while it does not appear by the record to be as palpably incorrect as that quoted above, is, in fact, equally so.

In the court below, in support of the objections to these certificates of protest, the technical objection was urged that it does not appear by such certificates, that the drafts were presented for payment to the proper person, or that there were no funds there for their payment. These certificates are the evidence relied upon, and are the only evidence in the case tending to establish that there ever was, in fact, any pretended protest of the drafts sued upon.

In these notary's certificates it is stated that the drafts were "exhibited to *a clerk* in the banking house of "Messrs. Barclay & Company, bankers, London, where "the said bill is accepted payable, and demanded payment "of its contents, which demand was not complied with, "but *the said clerk* thereunto answered 'no orders.'" (Rec., 107.)

To these certificates it was objected that to "exhibit" the draft to "a clerk" to which "said clerk" answered "no orders," was not sufficient. It does not show a proper or sufficient presentation and demand to warrant a protest. For aught that appears, the drafts were presented to some inferior or subordinate clerk, who had no duties or powers, or information whatever, in regard to drafts or their payment, who replied that he knew nothing about it, that he had received "no orders" as to that.

No restatement of facts will be presented by plaintiff in error. Enough has been said to show that the statement of facts by defendant in error is not to be implicitly relied upon.

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The brief of counsel for defendant in error shows the propriety of the motion entered in this case to strike from the record the so-called charge to the jury. It is urged that no exceptions were entered to this charge in the court below. Passing, for a moment, the question of whether or not the exceptions are sufficient, we ask, how could more definite exceptions have been entered? The trial was concluded and the jury directed to return a certain verdict for the plaintiff below, March 6, 1882. (Rec., 84–5.)

The charge, as it appears in this record, was not filed until April 5, 1882, a month after the instructions to the jury. (Rec., 208.)

That this "charge" was not in the bill of exceptions as proposed by counsel, and was not then in existence, is apparent from the form of the bill of exceptions on record, page 191. Immediately following the statement of the instructions by the court to the jury to render a certain verdict, and the exceptions thereto, are the words "which charge of the court was as follows," written in afterwards, and upon the margin is written directions to the clerk to here insert the charge "filed herewith," and that charge was filed, as above shown, April 5. The charge which was given to the jury was given orally, and the exceptions were taken in the same manner. Although this matter must be considered as it appears in the record in this court, still it may not be improper, in view of the fact that counsel for defendant in error urge that exceptions were not entered to the charge as they should have been, and to the further undisputed and indisputable fact that the charge now before the court here was filed a month after the trial, as above shown, to state that counsel for defendants below received no notice, nor were they in any manner advised, that this charge was in the record, or that it was proposed to put it there, until the transcript of record to file in this court was procured and examined by them.

But if the motion to strike the charge from the record should not be sustained, the exceptions entered by defendants below are entirely sufficient. The whole point of the charge was in that part which directed the jury to return a verdict for the plaintiff below for a specified sum. All the rulings of the court below, upon which errors are assigned, and which are urged in this court, were made outside and independent of the charge. The record is complete without this charge. It presents no rulings not elsewhere presented in the record. There are no "preliminary rulings." The whole charge is but the argument, the reasons of the court below, for directing a verdict for plaintiff below. This is apparent from the language of the concluding sentence of the charge (Rec., 208) which is: "With this view of the legal effect of the "undisputed facts, and of the immateriality of the con- "troverted questions, I think there can be no doubt of "the plaintiff's right to a verdict, and accordingly direct "you to return a verdict for the plaintiff for the amount "unpaid on the drafts, with interest at six per cent., and "the statutory damages, making in all the sum of $10,- "937.13."

This "final conclusion" embraces within itself all "preliminary rulings" in the charge. It is the essence of the whole charge. There is not a single ruling in the charge outside of, or not comprised within, this final conclusion, and to which exception was duly preserved. Counsel for defendant in error in several places in his brief speaks of "preliminary rulings" and of "final conclusion" in this charge, and urges that there are no exceptions to such "preliminary rulings," but nowhere attempts to point out any such "preliminary ruling" which is not in legal effect a part of the "final conclusion." Nor does he attempt to indicate a single point in the "preliminary rulings" which is not presented elsewhere in the record, and exceptions duly preserved. Neither does he indicate any such "preliminary ruling" to which an exception should have been entered, and bearing upon any contested point or question in this case. The reason is, that he could not, as none exists.

This general and pointless talk about no exceptions to "preliminary rulings" may be attributed to the same cause as the errors in the statement of facts above indicated, viz: an effort to sustain in a case that side upon which there is no merit or justice.

There is one thing more of the same character in brief for defendant in error, to which we may be pardoned for calling attention. It is stated that defendants below should have excepted specifically to such "preliminary findings" and the brief then adds (p. 11), "whereupon "they would have been entitled to insert in the bill of exceptions *all* the evidence offered on that point." Why this insinuation that the bill of exceptions does not embrace all the evidence offered by either of the parties? It does, and it so appears by the record. (Rec., 186.)

For convenience of reference the errors will be here again printed and the same order preserved in this reply as in former brief.

## I.

### THE DRAFTS SUED ON ARE FOREIGN BILLS OF EXCHANGE, AND WERE PREMATURELY PROTESTED, AND THE DRAWERS THEREBY DISCHARGED.

The first citation by defendant in error upon this point is *1 Parsons on Notes and Bills*, p. 282, the substance of which, as stated in the brief, is: "In case of a bill pay-"able a certain number of days after sight, the acceptor "usually does, and always should, state the date." Whatever the acceptor usually does can make no difference in the case at bar—the fact still remains that the acceptor did not state the date. We fail to see any force in this citation.

The next citation is *1 Daniel on Neg. Insts.*, Sec. 633. This states that " When a bill at sixty days' sight was " accepted on September 14, payable November 16," presentation and protest should be on the last named day. That is no doubt a correct statement of law, as the facts given show *the date of the acceptance*, and that the last named date is just sixty-three days thereafter. In the case at bar, however, the date of acceptance is not stated on the draft, nor is it shown anywhere in the record. This is significant when considered in connection with the fact that after this question was raised and argued in the court below upon the first trial, in February, 1880, defendant in error took the depositions of the acceptor and the assistant manager of the London Bank (who seems to have had these drafts in his charge), and they are not asked and do not state when the drafts were sighted or accepted.

The next and only other citation of authorities upon this point by defendant in error is *Kenner* v. *Creditors*, 19 Martin (La.), 540. The questions presented by counsel in that case, as stated by the court and passed upon by that court, were:

" 1. The acceptance was contrary to the tenor of the " bill, being for payment on the sixty-third, instead of the " sixtieth, day after sight."

" 2. The protest was made on the day of payment, " instead of the last of the days of grace."

The court sitting in Louisiana, where the civil law obtains, stated that the draft being accepted in England, must be construed according to the laws of that country, and that such laws were there foreign laws and must be proved as facts. Nine witnesses were examined in England. They were examined by appellants as to a draft drawn at sixty days' sight, and accepted in the following form: "Accepted, payable on the 10th of September. "Liverpool, July 12, 1825." By the appellees the same nine witnesses were examined as to a sixty days' sight draft, "accepted on the 9th of July, payable on the 10th "of September." It will be noticed that the difference between the two drafts, as to which the witnesses were examined, is, "that in the former the day expressly designated in the acceptance was the sixtieth, and the other "the sixty-third; in the one case the nominal, in the other "the peremptory day of payment."

It was the unanimous opinion of all these witnesses that the draft should not be protested until the sixty-third day after sight, and that when *the acceptance, being dated*, showed that the day of payment mentioned was but sixty days after sight, the protest should be three days after the day of payment thus designated, and that *when the acceptance was dated*, and the day of payment mentioned was sixty-three days thereafter, the protest should be on the day of payment thus designated. The day when the draft was accepted is in each case stated in the acceptance.

This is the only case which the able counsel for defendant in error has, presumably, been able to find, as it is the only case cited, and the only case in which any expression of a court has been found which counsel for defendant in error seems to conceive has any tendency in favor of his position. And even this case is not by counsel deemed to be sufficiently in point to make any quotation from, or to review it. We have given that case this much of attention mainly for the purpose of calling attention to the fact so clearly established by the evidence of the nine expert witnesses that the law and custom in regard to the demand and protest of foreign bills sixty years ago was the same as now, *i. e.*, when the date of acceptance is stated on the draft, the demand and protest must be on the sixty-third day thereafter, without regard to the date of payment or maturity mentioned in the acceptance. In effect, then, we claim that this evidence shows that when the date of acceptance is not given, the day of payment mentioned in the acceptance is the nominal, instead of the peremptory day of payment, the same as any other commercial paper, and days of grace are to be allowed thereafter. It will be remembered that the acceptance of the drafts in the case at bar are neither of them dated. The dates of payment, then, mentioned in the acceptances, are the nominal and not the peremptory days of payment. Demands and protests, such as were made, were on the nominal days of payment, and were premature.

With the authorities cited in our original brief, upon this error, we are quite content.

Counsel argues that the acceptor might state the date of acceptance, or might state when the bills would be due, including days of grace.

Because he might have done so, it does not follow that he did. He might, but he did not. As stated in the argument of the court below, and quoted in brief for defendants in error, there was no evidence to show when the bills were sighted or accepted. The word "payable," used in the acceptances in question, applies only to the *place* of payment. The only words in the acceptances touching the date of maturity are, "due 21 May."

The words construed by the court in *Perkins* v. *Franklin Bank*, 21 Pick., 483, are precisely the same, viz.: "due July 7." Counsel treats that case as only referring to the construction of a state statute. Let us see.

"SHAW, C. J., delivered the opinion of the court. The "statute, we think, is too explicit to admit of doubt. "(Rev. Stat., Chap. 33, page 5.) It provides that on all "promissory negotiable notes, payable at a future day "certain, in which there is not an express stipulation to "the contrary, grace shall be allowed. The statute refers "to the custom of merchants, in regard to foreign bills of "exchange, to determine what is grace.

"From that custom we know that grace is an allow-"ance of three days to the debtor, to make payment, "*beyond the time* at which, *by the terms* of the note, it *be-"comes due and payable.*

"It is contended, that here is in effect such a stipulation "in the note, on the margin, to wit: 'Due July 7, 1837.'

"But we cannot so consider it. *It shows when the note "is to become due*, and in this respect corresponds with the "stipulation in the body of the note.

"The time it *becomes due* being fixed, the statute gives "three days from that time for payment under the term "'grace,' unless the contrary be expressly stipulated."

Other cases cited in our original brief are to the same effect.

If, as is claimed, the acceptances are written contracts, to be construed by the court, we ask by what rule or principle of construction shall it be held that grace shall not be allowed? Suppose that instead of an acceptance we consider a promissory note or due bill without date, except the year, commencing "Due 21 May" next, etc. No one will contend that days of grace should not be allowed upon such a note or due bill. Why a different rule in construing an acceptance? There is no difference in law between a note and an acceptance as to days of grace.

But it is contended that days of grace were allowed or included by the acceptor in fixing the day when the bills should become due. That is a question of fact, which was fully argued to the jury by counsel for both parties. As there is no direct testimony in the case from which to determine this question of fact, it must be ascertained from a consideration of all the facts and circumstances of the case. That is clearly a question for the jury, and to take it summarily from the jury was erroneous.

We submit that the bills sued on were prematurely protested and the drawers, plaintiffs in error, thereby discharged, and that defendant in error should be relegated to its claim against the London bank.

## II.

### THE COURT ERRED IN HOLDING AND RULING AT THE TIME THAT THE CITY BANK OF LONDON WAS THE AGENT OF PLAINTIFFS IN ERROR, AND OF THEM ONLY.

To this error counsel for defendant in error devoted more space than to any other. But here also is shown the great lack of authorities to support the position taken by counsel for defendant in error. He cites but one case in the sixteen pages of his brief devoted to this error, viz.: *Merchants' Bank* v. *National Bank*, 1 Otto, 92. And there is no statement of what it is claimed is established by that case, but simply a reference to the first page.

A reference to the opinion of this court in that case shows the law to be just what plaintiffs in error claim it to be (p. 98): "That the holder of a bill of lading, who has become such "by endorsement and by discounting the draft drawn "against the consigned property, *succeeds to the situation* "*of the shipper*, is not to be doubted." The Chicago bank, defendant in error, succeeded to the situation of Bell & Co., plaintiffs in error, the shippers. As in that case, so in the case at bar, in the brief for defendant in error, "The argument assumes the very thing to be "proved," (p. 99) to wit: "That defendant in error was "in no way responsible for the acts and omissions" of the London bank.

The letters of hypothecation (Rec., 126) are but a *limitation* of the powers of the endorser of the bills, with authority to procure special insurance, and a promise to pay to the Canton bank, on demand, any deficiency. They only state what has been mutually agreed upon between Bell & Co. and the Canton bank. By the endorsements on the drafts, the London bank was notified that the Chicago bank held the drafts as agent of the Canton bank, and that the latter was the owner of the drafts. The letters of hypothecation do not purport to pass any title to or interest in the bacon. Nor do they purport to pass the possession or control of the bacon to the London bank. They only purport to notify the *manager* of the London bank what the agreement and limitations are as between the parties to the drafts. The endorsement and delivery of the bills of lading pass and control the title and possession of the bacon. Without those the London bank could do nothing. With those, and without the letters of hypothecation, the London bank could do what the owner could have done with the bacon. With both the bills of lading and the letters of hypothecation, the manager of the London bank succeeded "to the situation of the shipper," subject only to the limitations imposed by the shipper and contained in the letters of hypothecation. When plaintiffs in error delivered the bacon actually into the possession of the Canton bank, which they did by delivering the endorsed bills of lading, they parted with the property, the endorsee of the drafts and its endorsers and agents succeeded to their situation, subject only to the restrictions of the letters. The agreements therein contained as to paying the deficiency, if any arose, and as to insurance, etc., have no application to the question of the possession, control and disposition of the property.

All the parties at the time so understood the matter, *i. e.*, that the holder of the drafts, bills of lading and letters of hypothecation had and controlled the bacon, and they all acted upon that theory and understanding. Defendant in error sent the bacon to *its* general agent and correspondent in London. Its London agent reported to it *only*. Plaintiffs in error without any knowledge on their part or on the part of the Canton bank that the bacon had been given up, deposited with the Canton bank $1,000 as *margin* and the Canton bank sent to defendant in error *$1,000 for "margin."* Nearly two months after that the Canton bank in a letter to defendant in error said the meats "*are and have been* at *your disposal.*" In reply to that defendant in error wrote to the Canton bank that when it was remembered "of course *the property* "will be transferred to your orders." Defendant in error had previously advised the Canton bank that all the drafts with interest and expenses had been charged by defendant in error to the Canton bank. Neither the plaintiffs in error nor the Canton bank ever communicated in any manner with the London bank, or the London bank with them or either of them. The London bank did not recognize plaintiffs in error as its principals. It advised only with the defendant in error and accepted its orders as final and imperative. Defendant in error instructed the London bank to retain the bacon under its control. (See correspondence between defendant in error and London bank and Canton bank, Rec., 160 and 161.) There is not a single fact, circumstance or incident in the case indicating that any one of the parties to the transactions from the beginning up to the time of the failure of Jacks—three months after the London bank had turned the bacon over to him—understood or considered the London bank to be the agent of the plaintiffs in error. That is an afterthought supported only by a strained and improper construction of the letters of hypothecation. This is not the construction by the parties until such later date. As urged and supported by authorities in our original brief, it is a rule of construction, to apply the interpretation which the parties have given by their own acts. In the language of Lord Chancellor Sugden there quoted " Tell me what you have " done under a deed, and I will tell you what that deed " means."

The learned counsel for defendant in error in his brief concedes the correctness of our position " that where " parties have a joint interest, they may employ a joint " agent, and that loss through the negligence of such " agent must be borne proportionately," *i. e.:* in proportion to their respective interests. He seeks, however, to meet this by saying that, "the *letters* gave no interest in the "property to the Canton or the Chicago banks," and that they acquired "no title" to the property by the bills of lading. "That they could neither use nor sell the prop- "erty, nor control its sale or use." This unsupported statement by counsel is in conflict with the facts and the law. The record has been sufficiently reviewed to show that it is not in accord with the facts. That it is not in accord with the law, is clearly shown by the language of this court above quoted from *National Bank* v. *Merchant's Bank*, 1 Otto, 92, 98: "That the holder of a bill "of lading, who has became such by endorsement, and by "discounting the draft drawn against the consigned prop- "erty *succeeds to the situation* of the shipper, is not to be "doubted."

The application in the case at bar of this rule, that the losses occasioned by the acts or negligence of a joint agent, shall be in proportion to the respective interests of the parties, will result in reversal.

But, says the counsel, to claim that defendant in error is responsible for the shortcomings of the London agents "abashes the courage even of plaintiffs in error." That courage however still exists, notwithstanding the bold and labored effort of counsel for defendant in error. It is a courage begotten of an innate feeling and consciousness of the justice of our cause. And that same courage sustains in us an abiding conviction that justice and equity will triumph in this case, and that, though at great expense to plaintiffs in error, and after long delays, it will be announced in such language remanding this case, as shall be a practical termination of such expense and delay.

## III.

### THE COURT ERRED IN HOLDING THAT THE ENDORSEMENTS IN WRITING UPON THE DRAFTS SUED UPON COULD BE ALTERED, CONTRADICTED, AND THEIR EFFECT VARIED BY PAROL PROOF, AND IN PERMITTING PAROL PROOF TO BE INTRODUCED FOR THAT PURPOSE.

In brief for defendant in error it is contended that this rule applies only to parties to the contract and their privies, and that plaintiffs in error are neither parties nor privies to the endorsements which were changed in the court below by parol proof. There is no effort to controvert the rule of law presented by this error.

The court will recall the fact that the first endorsement is in these words:

"Pay to the order of the First National Bank of Can-
"ton, Ill.

"HUMPHREY BELL & Co."

This is the first endorsement which was "altered, con-"tradicted, substracted from and the effect varied" by parol proof in the court below against the objection of plaintiffs in error.

Counsel does not attempt any argument to apply to this endorsement the point which he seeks to make, that the rule presented in this error applies only to parties and privies. How could he? Plaintiffs in error are specifically *parties* to this endorsement. Counsel cites no authority and makes no attempt in his argument to show any rule of law sustaining the ruling of the court below in allowing parol proof to change this endorsement.

The next endorsement is by C. T. Heald, cashier of the Canton bank, to defendant in error or order, "for "collection account of First National Bank of Canton, "Ill." To this endorsement it is claimed plaintiffs in error are neither parties *nor privies*, and that, *therefore*, it may be changed, altered or contradicted by parol testimony.

Does it follow, even if plaintiffs in error are not privies, that defendant in error could change the endorsement by parol testimony? It seems to us not. Even if the original drafts and the successive endorsements could be considered as separate and independent contracts, still this endorsement is a contract necessary to be put in evidence by plaintiff below. It is one of the conveyances or transfers in the chain of title, and through and by virtue of which defendant in error claims title. Why should that be changed by parol testimony any more than any other contract in writing, or conveyance which is necessary to sustain the plaintiffs' title? We will, however, consider this in connection with the question of whether plaintiffs in error are privies to this endorsement.

Who are privies? As defined by Lord COKE they are: "Privies in blood, as the heir; privies in estate, as the "feoffee, lessee, etc.; privies in law, as the lord by escheat, "tenant by the curtesy, tenant in dower, the incum- "bent of a benefice, and *others that come under*, by act of "law, or *in the post*, shall be bound by and take advan- "take of estoppels." The question of *privity* is most generally considered by text writers, and usually arises in the courts, in connection with real estate or some interest therein. Mr. Greenleaf defines it thus: "The term "*privity* denotes mutual or *successive relationship to the* "*same rights of property*."

1 Greenl. on Ev., § 189.

This definition by Mr. Greenleaf is in effect the same as the language of Lord Coke, "others that came under, "by act of law or in the *post*"—and as the language of the court in *Coan* v. *Osgood*, 15 Barb., 588: "where one "succeeds to the rights of another, or, as it is sometimes "expressed, when one comes in, *in the post*, to another."

The opposites of *privies* are termed *strangers*. Persons are either *parties*, *privies* or *strangers* to a contract. If not *strangers*, they are then either *parties* or *privies*. How can it be consistently or successfully argued that plaintiffs in error are in this suit *strangers* to this endorsement? The endorsement is introduced in evidence by plaintiff below, and then it is sought to change it by parol testimony. This endorsement is a necessary link in the chain. It is under and by virtue of this endorsement that plaintiff below must recover, if at all, in this case. But with the endorsement as written it cannot recover. Being a necessary link in the chain of title—introduced by plaintiff below, and without which no recovery could be had—and plaintiff below being one of those "that came under" this endorsement in "successive relationship," defendants below are clearly not *strangers*, but *privies*, if indeed they be not *parties*, in the eye of the law.

The case apparently principally relied upon by counsel for defendant in error is *McMaster* v. *Ins. Co.*, 55 N. Y., 223, 234. That was a suit upon two insurance policies, issued by defendant, to Samuel B. Lake—one made *payable* to the plaintiff, the other to Maria B. Clark, and by her assigned to plaintiff, describing certain carriages and vehicles. The policies contained the usual provision that in case of "other insurance on the property herein insured, "or any part thereof," without notice and consent in writing, the policy should be void. Another policy was subsequently procured by Lake, loss payable not to the plaintiff in that suit, but to another party. The property covered by the different policies was described as at the same place, as in the same building, but the description given in the policies, of the carriages, vehicles, etc., was different. In the proofs of loss, it was stated that there was other insurance upon the same property, but it was claimed upon the trial that, in fact, the property covered by the last policy was not the same as that covered by the policies sued upon. The insurance company claimed that the "plaintiff was estopped, by the statement in the "proofs of loss, from showing that the Hartford (the last) "policy was not upon the same property as the policies in "suit."

To the witness, Lake, who was *not* a party to the suit, was put the question: "The buggy, chariotees, lumber-"wagon, and other vehicles—was that the same prop-"erty as mentioned in either of the policies sued upon?" It is in such a case and upon such a state of facts, and upon such an interrogatory to witness, that language of the court is used which is quoted in brief for defendant in error.

It is a familiar rule that the language used by a court in its opinion is to be considered and understood to be used in connection with the facts and circumstances of the case under consideration. It would seem as though the question to the witness was proper, and should have been sustained upon entirely other and different grounds, and that the language of the court was mere *dicta*. But be that as it may, the expressions of that court used in regard to the facts, circumstances and questions before it cannot be considered as authority in the case at bar, which is so wholly unlike that case. That the court did not intend that the language used by it should be construed as is done in brief for defendant in error is also evident from the fact that such a construction is not supported by the two cases cited by that court.

The other cases cited by defendant in error cannot be considered in point. *Lee* v. *Adsit*, 37 N. Y., 78, and *Lowell Mfg. Co.* v. *Ins. Co.*, 88 N. Y., 599, are both by third parties, and pertaining to losses under insurance policies. *Edgarly* v. *Emerson*, 23 N. H., 565, and *Needles* v. *Hanifan*, 11 Ill. App., 307, are both where evidence was offered in relation to certain *receipts* which had been given, and in neither case was the receipt the instrument sued upon, nor was it a link in the chain of title; nor did it pass between the parties to the suit.

The only other case is *Masterson* v. *Boyce*, 29 Hun., 456, which was "for a breach made upon the sale" of 1100 shares of coal company stock. One White contracted, in his own name, to sell the stock to plaintiff, but it was claimed by plaintiff that White was in fact the agent of defendant in the transaction. The question before the court was whether such agency could be proved by parol, the agreement between White and plaintiff being in writing. The court held that the agency, if it existed, could be shown by parol, the finding of the court, as expressed in the syllabus, being that a written agreement only "concludes parties, privies, and *those* "*claiming through it*."

The Chicago bank and the Canton bank entered into a combination against the plaintiffs in error, which the evidence justifies us in charging to be, in law, a fraudulent combination or conspiracy. Having done this, they should be treated and considered in this case as one person. If this be correct, then, even though the endorsements were to be considered as separate contracts, still plaintiffs in error should be regarded as though they were parties to such endorsements.

1 Greenl. on Ev., Sec. 190, note 2.
*Cuyler* v. *McCartney*, 33 Barb., 165, and cases there cited.

It will be observed that there is not a citation by defendant in error where the question was considered with reference to commercial paper or an endorsement of such paper. The general question as to who are *privies*, although not as to commercial paper, is discussed more or less at length in

1 Greenl. on Ev., Sec. 189.
*Stacy* v. *Thrasher*, 6 Howd., 44, 59.
*Campbell* v. *Hall*, 16 N. Y., 575.
*Coan* v. *Osgood*, 15 Barb., 583.

The citations upon this error, by plaintiffs in error, in original brief, were cases involving questions upon commercial paper. They are conclusive upon this point, as it seems to us. Defendant in error, in discussing them, *omits any reference* to *Brown* v. *Spafford*, 95 U. S., 474, cited in our brief. That was a case by third endorsee against the makers of certain promissory notes. Upon the trial defendants offered testimony tending to show that as between themselves and the payee they had a good defense to the notes, and tending to show that in effect plaintiff held the notes sued upon as agent for the payee, or with notice of such circumstances as would have put a prudent man on inquiry concerning any agreement between defendants and payee—although by the endorsements plaintiffs appeared to hold the notes as absolute owners. This evidence was excluded by the trial court, and such ruling was sustained by this court.

In original brief for plaintiffs in error we argued that the plaintiff, in a suit upon commercial paper, must have the *legal* title when suit is commenced. In support of this, *Burnap* v. *Cook*, 32 Ill., 169, was cited. Although counsel for defendant in error says that case "has no relevancy," we submit that it does definitely and distinctly hold such to be the law. In the case at bar defendant in error did not have the legal title to the drafts sued upon at the time suit was brought thereon, or at any other time, and could not in law recover, unless it be proper for the court to make a new contract, differing materially from the written contract in evidence, ignore the jury, and enter a finding upon its construction of a contract, in effect, made by the court itself.

Counsel is evidently unable to drive from his mind the fact that there were disputed questions of fact that should have been submitted to the jury. In one place (p. 32) he says: "There was testimony *tending to show*" that defendant in error purchased the drafts—again (p. 33) "Testimony was admitted *tending* to show such purchase." Why such language in regard to an undisputed question of fact? The weight of evidence "tending to show" a certain supposed, but disputed, fact, is for the jury.

It being then, as we contend, clearly the law as to commercial paper, supported by an unbroken line of authorities, that endorsements in writing upon notes and drafts cannot be altered, contradicted, added to or substracted from, or their effect varied by parol proof, it follows that the concluding clause of this third error must be sustained, viz.: that the court erred "in permitting parol proof to "be introduced for this purpose." The record shows beyond all question that such evidence was introduced, and for that purpose, and that the court below held, that by such parol proof, the written endorsements were altered, contradicted, substracted from and their effect varied.

## IV.

### THE COURT ERRED IN INCLUDING IN HIS FINDING STATUTORY DAMAGES UNDER THE STATUTE OF ILLINOIS.

The record shows that the protest fees, cablegrams telegrams, and expenses, were all paid to the defendant in error by its principal, the Canton bank. Besides statutory damages, interest in full was included. Are not the statutory damages, then, in the nature of a penalty? The statute should be strictly construed as argued in original brief for plaintiffs in error.

Upon the drafts and the endorsements thereof, as they are written, *i. e.*, upon the contracts as reduced to writing by the parties, defendant in error is not entitled to these damages.

*Hambro* v. *Casey*, 110 U. S., 216.

Clearly the statute is intended and can only be applied in a case where the plaintiff was the legal holder of the draft when suit thereon was commenced, and where recovery is had upon the draft and endorsements, and not where a recovery is had upon parol proof of what it is claimed an endorsement should have been, nor in a recovery upon the *quantum meruit*.

Counsel for defendant in error in arguing as to this point says: "The claim in this case is upon the drafts "themselves," and bases his argument upon that supposed fact. The finding was not, however, upon "the drafts "themselves," but upon parol proof changing the drafts, and statutory damages are allowed in a recovery based upon such parol proof. This was error.

## V.

### THE COURT ERRED IN ADMITTING TESTIMONY OFFERED BY PLAINTIFF BELOW, AND IN EXCLUDING EVIDENCE OFFERED BY DEFENDANTS BELOW.

This court is respectfully requested, in considering this, to examine the record, or the *quotations* therefrom in original brief for plaintiff in error, rather than the narative statement thereof presented in brief for defendant in error.

The drafts with the endorsements thereon were offered and introduced in evidence by plaintiff below. No objection was made as to the genuineness of the signatures, or the form or language used in either of them, either the face of the drafts or the endorsements. Upon what principle then, should plaintiff below be permitted to alter and substract from such endorsements material parts thereof by parol proof? Why should plaintiff be allowed first to introduce in evidence the written contract declared upon by it, and then change it into a new and entirely different contract by parol proof?

The declaration filed by plaintiff (Rec., 9–18) contains three special counts, one upon each draft. In each of these counts the special endorsements upon each draft are averred.

By the statute of Illinois the plaintiff is required to file with his declaration a copy of the instrument sued upon. (Rev. Stat. Ill., 1877, Ch. 110, p. 736, Sec. 18.) In *Nauvoo* v. *Ritter*, 97 U. S., 391, this court held that under this section of the statute of Illinois the copy of the instrument sued upon being attached to the declaration, "became a part of the pleadings in the case."

In the case at bar, copies of the drafts, acceptances and endorsements were attached to the declaration as required by the statute. (Rec., 22 and 23.) Such copies thus "became a part of the pleadings in the case."

The plaintiff nowhere in its pleadings makes any averment of any fraud, accident or mistake in these endorsements, or any averment of any right of recovery except upon the endorsements precisely as they appear upon the drafts, and are set out in its declaration. The issue was definitely and distinctly made that the plaintiff claimed to recover upon the drafts and endorsements as they were written and appeared in the declaration. Upon the trial plaintiff was permitted to introduce testimony, not to sustain the averments of its declaration, but to prove an entirely different contract—testimony tending to show endorsements different from these declared upon, and at variance therewith.

And this in a case where, as the record shows, the Chicago bank (plaintiff) and the Canton bank, special endorser, had entered into a combination against the defendants. October 7, 1878, Gage, cashier of plaintiff bank, wrote to the Canton bank that unless satisfactory adjustment of its liability, as endorser, was made at once, suit would be commenced. (Rec., 166-7.) To this Heald, cashier of the Canton bank, replied, October 14, that he was unable to persuade defendants to pay the money, and that "*in case we* voluntarily reimburse you, " as demanded, *a new complication* enters into the case, " which may seriously affect our position." (Rec., 167.)

Then follows other correspondence resulting in the Chicago bank agreeing to sue defendants; the Canton bank agreeing and giving bond to purchase the judgment at full face value, and interest and costs, and pay one-half of plaintiff's attorney's fees and expenses. (Rec., 171.)

What is the " new complication " which might " seriously affect " the position of the Canton bank in case it should pay the money upon its liability as endorser? Why this combination or conspiracy against Bell & Company? And why, under the pleadings and issue in this case, should the rules of law and practice be set aside to aid this conspiracy?

The relation of defendants below to these drafts is in law that of endorsers. A recovery cannot be had against them, neither can statutory damages be recovered, upon the money counts. There can be no recovery upon the *quantum meruit* against an endorser of commercial paper or for statutory damages.

Again plaintiff was permitted to put in evidence a private conversation between Gage, its cashier, and Boulton, one of its employees, which occurred when neither of the defendants, or any one representing them, was present. This conversation, if competent, tended to show, and was apparently offered for the purpose of showing, some arrangement or agreement between the plaintiff or defendants below. Counsel for defendant in error seeks to justify this on the ground that it was a part of the *res gestae*. *Res gestae* has been resorted to for the purpose of covering or justifying almost every conceivable error in the admission of testimony in trial courts, but it is against all reason and all rules of evidence to establish or attempt to establish an agreement between plaintiff and defendants by showing the details of a private conversation between two of the plaintiff's employees. All that could have been competent in that communication as *res gestae* or otherwise would have been to show that Boulton was authorized to act for the bank in making a contract with defendants.

It was not competent to attempt to show in that manner not only that a contract was made, but also the terms of such contract.

## VI.

### THE COURT ERRED IN TAKING THE CASE FROM THE JURY, AND IN REFUSING TO PERMIT THE JURY TO PASS UPON CONTROVERTED QUESTIONS OF FACT, AND IN REFUSING TO INSTRUCT THE JURY AS REQUESTED BY ATTORNEYS FOR DEFENDANTS BELOW.

Although counsel for defendant in error had devoted more than fifty pages of brief to this case before considering this error, yet he here informs us that this is the only proper assignment of error made. And even the small comfort of having properly assigned one error, counsel seeks to minify by the repetition of the groundless talk that " the *preliminary* rulings of the court which *necessi-*" *tated* the *final* conclusion, cannot be considered."

The right of trial by jury is guaranteed not only by the constitution of every state in the Union, but by the Federal constitution. As expressed by this court in *Baylis* v. *Insurance Co.*, 113 U. S. 321, "this constitutional "right this court has always guarded with jealousy." That case was similar in some respects to the case at bar. At the trial the court directed the jury to render a verdict for the plaintiff for the full amount claimed, subject to the opinion of the court upon the question whether the facts proved were sufficient to render the defendant liable, and a verdict was rendered accordingly. Thereupon the plaintiff moved for judgment upon the verdict, and the defendant moved for judgment in its favor on the pleadings and minutes of trial. Judgment was accordingly rendered for defendant upon the opinion of the judge. Had the court entered judgment for the plaintiff instead of for the defendant, the case would have been like the case at bar, except that this case was not closed with the evidence of the plaintiff, but a large amount of evidence was introduced by defendant, much of which was in direct conflict with the evidence introduced by the plaintiff. The case was then fully argued on both sides to the jury on the questions of fact.

Questions like that now under consideration usually, and we might almost say always arise, when the court is asked or determines to direct "a verdict for the defendant on "the ground that the evidence, with all inferences that "the jury could justifiably draw from it, was insufficient "to support a verdict for the plaintiff, so that such a ver-"dict, if returned, must be set aside." It is almost if not entirely without precedent for the court in a case where there is a large amount of testimony introduced on both sides—where there are serious contradictions in the testimony—and where the questions of fact involved are fully argued to the jury by counsel for both parties—to take the case from the jury and decide, not that the evidence of the plaintiff "with all inferences that the jury could "justifiably draw from it was insufficient to support a "verdict"—but that the evidence of the defendant was insufficient to defeat a recovery by plaintiff.

That is precisely what this court condemns when it says, in the case just quoted from; "But, without a waiver of the right of trial by jury, by consent of parties, "the court errs if it substitutes itself for the jury, and "passing upon the effect of the evidence, finds the facts "involved in the issue, and renders judgment thereon."

It may, however, be said that the jury did render a verdict in the case at bar and that the court only entered a judgment upon that verdict. In one sense, or in mere technical form, as the record was written up by the clerk, that may be true, but in substance and in fact it is not true. It appears in the record that "the court charged the jury "that the plaintiff was entitled to a verdict and directed "them to render a verdict for the plaintiff" for an amount specified by the court, "which was done accordingly." (Rec., 191.)

Not a verdict according to the judgment of the jury but one according to the views and positive instructions of the court. To call this a verdict of the jury, in the sense in which a right of trial by jury is guaranteed by the constitution, would be to insult the intelligence and fair mindedness of this court.

There is no attempt by defendant in error to controvert, by a review of our cases, or by citing any authorities, the cases cited by us upon this error, or the conclusions deduced therefrom. Counsel cites one text writer to show that "The construction of all written instruments belongs "to the court," a proposition we have never attempted to controvert. What we have contended is that when these drafts were accepted "Due 21 May," the acceptance being without date, there is nothing for the court to construe, unless it be that "21 May" means "the 21st day "of May."

Counsel says that if defendant in error "immediately on "acquiring them (the drafts) paid their value to the Can-"ton bank, such fact demonstrated that it was a pur-"chaser and not an agent for collection." This is not correct. The members of this court know, from the fact frequently appearing in cases before it, as well as from their knowledge of the mode of conducting business between banks in this country, that it is the usual course for banks in the larger cities to pass to the credit of country banks in good standing, collections passing through their hands, having thereon the endorsement of the country bank.

Again, counsel says that "when they (the drafts) were "sold, the proceeds were paid to Bell & Co." This is also incorrect. The Canton bank had paid Bell & Co.'s checks to a considerable amount, on account of these drafts, before the drafts were given to it. (Rec., 178, and 110–11.)

In considering this error counsel, by discussing the evidence, and the weight and preponderence of testimony, again involuntarily demonstrates the fact that there were controverted questions of fact, which it was solely within the province of the jury to determine. He could not avoid it if he considered the evidence at all.

## VII.

### THE FINDING AND JUDGMENT OF THE COURT BELOW ARE CONTRARY TO LAW AND TO THE EVIDENCE.

This is a form usually adopted in assigning errors in the Supreme court of Illinois. In our original brief we summarized under this error the points upon which we considered the finding and judgment of the court below to be contrary to law. We did not then enter into any argument upon the merits of the case, but invited such argument from defendant in error. Whether an attempt to argue that justice and the merits of this case are with defendant in error "abashes the courage even of" defendant in error, we will not assume to determine. Certain it is that the invitation so to do was not accepted. And in no place in his brief does counsel for defendant in error assume to argue or urge the justice of his clients' claim upon its merits. Our faith in the merits of our client's case, and in the ultimate triumph of the right, lead us to finally submit this cause to this court with the utmost confidence.

HORTON, HOYNE & SAUNDERS,
*Attorneys for Plaintiffs in Error.*

O. H. HORTON,
*Of Counsel.*

Office Supreme Court U. S.
FILED.
OCT 15 1885
JAMES H. McKENNEY.
CLERK.

115-373

IN THE

# Supreme Court of the United States,

OCTOBER TERM, A. D. 1885.

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| **HUMPHREY BELL, ANDREW J. WHITNAH and HIRAM A. WHITNAH,** *Plaintiffs in Error,*<br>*vs.*<br>**THE FIRST NATIONAL BANK OF CHICAGO,** *Defendant in Error.* | **Error to the Circuit Court of the United States for the Northern District of Illinois.** |

## REPLY FOR PLAINTIFFS IN ERROR,

UPON MOTION TO STRIKE FROM THE RECORD THE "CHARGE TO THE JURY."

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*Defendant in Error.*

**Error to the Circuit Court of the United States for the Northern District of Illinois.**

## REPLY FOR PLAINTIFFS IN ERROR,

### UPON MOTION TO STRIKE FROM THE RECORD THE "CHARGE TO THE JURY."

It may not, perhaps, be important to plaintiffs in error whether this motion is sustained or not. In either event, counsel for plaintiffs in error is relieved from all responsibility for a violation of the rules and instructions of this court by inserting in the record "the charge of the "court below at length."

Counsel for defendant in error, in opposing this motion, says:

"No change to correct an alleged variance between "the transcript here and the record below is sought, but "this court is asked to strike out a part of that record "as actually made by the Circuit court." This is no reply to a motion to strike out what is inserted in conflict with the rule and decisions of this court. If this position be tenable then the rules and rulings of this court may be disregarded or violated and this court is powerless to do otherwise than submit. Let the judge of the *nisi prius* court, who may be anxious to present to this court his personal views, in effect to argue the case before this court, but give his reasons or his argument at the time he instructs the jury, and then insert the same in the record, upon his own motion and even without the knowledge of the counsel in the case, and this court, as well as the counsel, must quietly submit. The *nisi prius* judge has overruled this court, and its action is final.

Again counsel for defendant in error says the Circuit judge did not "simply instruct the jury to find for the "plaintiff, but first made a series of preliminary rulings and "findings to support his final instruction, and to these preliminary rulings and findings, so far as claimed to be "erroneous, it was the duty of plaintiffs in error to have "excepted *seriatim*."

The court instructed the jury explicitly to return a verdict for a specific sum which appears in the record, separate and distinct from the so-called "charge to the jury." (Rec., pages 85 and 191.) Counsel does not assume to state or point out any "preliminary rulings and findings" which are distinct from or independent of the "final instruction" to find a verdict for plaintiff for a given amount. We are unable to see how there can be any rulings and findings which are or can be *preliminary* to such a definite *final* instruction, other than such as are statements of the reasons for this definite final instruction. That is all that the charge in question assumes or purports to be. It is precisely what is referred to in the fourth rule and in the decisions of this court as "the charge of the court at large to the jury in a trial at "common law," as not proper to be inserted in the bill of exceptions.

Counsel refers to the charge in the record as "a stenographer's copy of the charge" and says: "But it is a "fact that the charge was given upon the trial, before the "verdict of the jury was rendered." In answer to this statement we aver that it is not a fact that the "charge," as it appears in this record, is a *correct* stenographer's copy. That is not, however, the question proper to be here considered. The "charge to the jury," inserted in this record, is "the charge of the court at large to the "jury in a trial at common law," which this court, by its rules and rulings, has said should not be so inserted. The motion should therefore be allowed.

O. H. Horton,
*Counsel for Plaintiffs in Error.*

115-373

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FILED.
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IN THE

# SUPREME COURT of the UNITED STATES,

OCTOBER TERM, A. D. 1884.

(No. 294.)

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| HUMPHREY BELL, ANDREW J. WHITNAH AND HIRAM A. WHITNAH, *Plaintiffs in Error,*<br>vs.<br>THE FIRST NATIONAL BANK OF CHICAGO, *Defendant in Error.* | Error to the Circuit Court of the United States, Northern District of Illinois. |

## Brief and Argument for Defendant in Error.

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CHICAGO:
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1885.

IN THE

# SUPREME COURT OF UNITED STATES.

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## OCTOBER TERM, A. D. 1884.

HUMPHREY BELL, ANDREW J.
WHITNAH AND HIRAM A. WHITNAH,
*Plaintiffs in Error*,

vs.

THE FIRST NATIONAL BANK
OF CHICAGO,
*Defendant in Error.*

**Error to the Circuit Court of the United States, Northern District of Illinois.**

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## Brief and Argument for Defendant in Error.

### STATEMENT OF THE CASE.

This case was upon three foreign bills of exchange, drawn by Humphrey Bell & Co., of Canton, Ill., upon W. D. Turner, Jr., of Liverpool, England. One of these bills is as follows :

£800. CANTON, ILL., March 4, 1878.

Sixty days after sight of this first of exchange (the second and third unpaid), pay to the order of ourselves, in London, eight hundred pounds sterling, value received, and charge to the account of

HUMPHREY BELL & CO.

*To W. D. Turner, Jr.,*
*Liverpool.*

The second bill is in the same language, except that it is for £850. The third is the same, except that it is dated March 11, 1878, and is for £800.

The drafts were, by Humphrey Bell and Co., endorsed and delivered to the Canton bank, at or about their dates; by it were endorsed and delivered to the Chicago bank, the defendant in error, and by the latter endorsed and delivered to the City Bank of London. The endorsements upon the drafts as declared upon, and as shown in the record, are as follows, in each of the first two:

"Pay to the order of the First National Bank of
" Canton, Ill.
" HUMPHREY BELL & CO."

" Pay First National Bank, Chicago, or order, for col-
" lection account of First National Bank of Canton, Ill.
" C. T. HEALD, Cashier."

" Pay to the order of City Bank of London, for
" account of First National Bank, Chicago.
" H. SYMONDS, C."

Across the face of these drafts is the following:

" Accepted, payable at Messrs. Barclay & Co.,
" bankers, London; due 21 May.
" W. D. TURNER, JR."

The endorsements on the third draft are the same, and the acceptance the same, except "due 31st May."

The drafts, endorsements, etc., were offered in evidence, and admitted without objection. It was shown that demand was duly made upon the drafts, and that the same were protested for non-payment, the two first upon May 21st, and the third May 31st, and that notice was duly given to the Chicago bank, the Canton bank, and to

Humphrey Bell & Co., plaintiffs in error. The notice to Humphrey Bell & Co. was given to Bell, the senior partner in the firm. No objection is made to the demand, protest, and notice by plaintiffs in error, except that they insist that demand and protest were prematurely made, and that three days' grace, *after said dates*, should have been allowed; and they further object that statutory damages, which were allowed at the trial, should not have been allowed without *individual notice to the other partners* in the firm of Humphrey Bell & Co.

The claim of defendant in error is, that sixty days' sight and three days' grace were included by the acceptor when he made the drafts *due* as stated, and that, were the matter in doubt, the testimony of the acceptor, that he dishonored the drafts at their maturity made it certain, and that notice to the drawers was complete when given to one of the firm, so as to justify the allowance of statutory damages.

On the part of plaintiff below, proof was admitted to show when the blank endorsement on the drafts, over the signature of Humphrey Bell & Co., was made, and also to show that the Chicago bank actually purchased the drafts and paid full value for them when they were received; that the transaction was a sale, and that the Chicago bank did not take them for collection, and that the use of the words "for collection account of," in the endorsements of the Canton bank and in its letters to the Chicago bank, accompanying the drafts, was the result of carelessness, and did not express the actual transaction between the two banks.

This testimony was objected to by defendant below, on the ground that the language of the contract made on these negotiable instruments could not be varied by parol evidence.

plaintiff
It was claimed by ~~defendants~~ below, and the court held, that such rule applied only between parties and privies, that the evidence was admissible, and that it was competent, as between the two banks, to establish the real facts of the transaction.

Evidence was also admitted, against the objection of defendants below, tending to show that at some time prior to the date of the drafts, an arrangement had been made by defendants below, or on their behalf, with plaintiff below, whereby said plaintiff was to purchase said drafts of said defendants, provided they bore the endorsement of the Canton bank; thus raising the question, whether the purchase by the plaintiff below was a purchase from the Canton bank or from defendant below.

The production of the drafts, endorsements, proof of demand, protest and notice, proof of *purchase* of the drafts by the Chicago bank, and proofs in regard to such arrangement between plaintiff and defendants below, made the case of plaintiff below. It was not questioned that all moneys received by plaintiff below were endorsed upon the drafts, as shown in evidence.

The case for the defendants below was this:

When the drafts were drawn, defendant below delivered, with each draft, a bill of lading for 120 boxes of bacon through from Canton to Liverpool, as security for the drafts. Defendants showed that the bacon was shipped by defendants below, was consigned to their own order, and the bills were by them endorsed in blank at the time of their delivery to the Canton bank.

At the same time they delivered to the Canton bank, with the drafts and bills of lading, what are described by witnesses as " letters of hypothecation." The letters were alike, except that they conformed to the drafts in dates and amounts. One of them is as follows:

" CANTON, ILL., March 4, 1878.

" *To the Manager of the City Bank, London, England :*

" SIRS—We have this day sold to the First National " Bank a bill of exchange for 850 pounds on W. D. Turner, " Junr., against the shipment of 120 boxes bacon. The " agreement with the First National Bank is, that if said " bill is accepted and the acceptance is satisfactory to you, " the bill of lading is to be given up to him without prejudice to your claim; that is, in the event of the bill not " being paid at maturity, or if they decline to accept, or if " the acceptance is not satisfactory to you, or if the bill be " not paid at maturity, then you are hereby authorized to " retain the bill of lading, and at any time, at your discretion, to place the goods in the hands of your broker, " for sale, on account of whom it may concern, and apply " the proceeds towards the payment of the bill; and in " case of any deficiency, we hereby agree to pay the " amount of such deficiency to the First National Bank on " demand, and also that if you should require the transfer " of the policy of marine insurance, the same shall be " given, and in case of refusal to transfer by the parties " drawn on, then you are to have the privilege of effecting a special insurance, for cost of which you are to have " a lien on the above merchandise.

" Yours respectfully,

" HUMPHREY BELL & CO."

Attached to each draft was one of the bills of lading and one of these letters.

During the time the bills were running, the papers, and, consequently, the property represented by the bills of lading, remained with the London bank, which had received them from the Chicago bank, which in its turn had obtained them from the Canton bank, and the latter from the makers.

On May 21 and 31 the London bank cabled to the Chicago bank that the drafts had gone to protest. The Chicago bank notified the Canton bank thereof by letter, and in such letter, said : " Be kind enough to advise me what disposition shall be made of the property." The Canton bank thereupon notified defendants below, and they directed the Canton bank to telegraph the Chicago bank, " Request Alfred Jacks to sell goods for benefit of drafts." Upon receipt of this dispatch the Chicago bank telegraphed the London bank, " Let Alfred Jacks sell 7,983, 7,984, under your control." It was proved that these numbers referred to the numbers on two of the drafts and bills of lading, and so described the property. The like acts were repeated on protest of the third draft. Thereupon the London bank turned the bills of lading over to Alfred Jacks, who did business under the name of Alfred Jacks & Co. Jacks sold most of the goods and falled, without paying over the money to the London bank. Such goods as were then unsold were afterwards sold, the proceeds paid to the London bank and endorsed on the drafts. Claims on the drafts were made against the banks and the estates of Turner and Jacks, and the amounts realized were endorsed on the drafts.

It was insisted by plaintiff below, and the court held, that by the hypothecation papers, the London bank became the agent of the defendants below in regard to the custody and disposition of the bacon, and that it was not the agent of the Chicago bank, plaintiff below, in regard thereto; and that the only right of the latter was to the proceeds of the bacon when sold; whereas, defendants below insisted that, in regard thereto, the London bank was either the sole agent of the Chicago bank, or the agent of defendants and plaintiff below, jointly.

It was insisted by the defendants below, that by the telegram to let Jacks sell the meat, they intended that he should do so as a broker and not as a factor. The court held that the telegram must speak for itself. They insisted that they so told the Canton bank when they directed the telegram. The court held that evidence of any conversation which resulted in sending the telegram, and which was not communicated to the Chicago bank or the London bank, was inadmissible.

Defendants below also insisted that their rights were affected by the act of plaintiff below in adding to the telegram the words " under your control. " Plaintiff insisted that the words were descriptive of the property, and so did not change the meaning of the dispatch; that if they modified the original dispatch in any way, it was by requiring the London bank to keep possession of the property, which the Chicago bank had a right to insist on, as a beneficiary under the bills of lading and hypothecation papers; and, next, that as the complaint of defendants below was based upon the fact that the London bank did not keep control of the goods, any act of the Chicago bank, calculated to further the intention of defendants and to prevent the act on the part of the London bank complained of, did not render plaintiff liable for the disobedience by the London bank of defendants' directions or for the consequences thereof.

The court held that under the hypothecation papers, the London bank was authorized by defendants below to select its own broker; that the dispatch in regard to Jacks left the powers of the London Bank unchanged, except that a broker was designated by defendants; that the addition to the dispatch was, at the most, a restriction by plaintiff to make the employment of the broker conformable to the letters of hypothecation, and that the telegram did not revoke the letters of hypothecation or make the London bank the agent of the Chicago bank, individually or jointly.

Defendants below insisted that the London bank ought not to have given possession of the property to Jacks; that it was also guilty of negligence in not collecting from Jacks, and that the Chicago bank was responsible for such act and such negligence.

Plaintiff claimed that the London Bank was not its agent; that no duty was imposed upon it; that hence it was guilty of no negligence. The court below so held.

Defendants also insisted that when the partnership between them was formed, Heald, the cashier of the Canton bank, agreed that if the firm would do its business with him he would guarantee that there should be no losses; that as the Chicago bank was simply an agent of the Canton bank, and not a purchaser, defendants could make the same defense as though the suit was by the Canton bank.

Plaintiff insisted that it was a purchaser, and that, even were the defense good as against the Canton bank, it could not be availed of in this action. Next, that the arrangement, as stated by defendants, was an individual one on the part of Heald, and not that of his bank; and, therefore, could not be asserted, even against the Canton bank. And, finally, that such a guaranty, if made on behalf of the Canton bank on such consideration, was outside the scope of the duties of the cashier of the National Bank, as the Canton bank was shown to be, and that said bank and its stockholders could not be bound thereby. The court excluded the evidence.

There was evidence on the part of the defendants tending to show that after their partnership was formed, Whitnah, one of the partners, informed Heald, cashier of the Canton bank, that it was provided in their partnership articles that when any considerable amount of money was at stake the papers in regard to the same must be signed by the members of the firm, in their individual names. There was no evidence tending to show that the Chicago bank or the London bank had any information of such conversation or such facts.

The defendants introduced in evidence correspondence between the Chicago bank and the Canton bank, which showed, in substance, that the Chicago bank some time after the failure of Jacks wrote the Canton bank, threatening suit against it as an endorser on the drafts, unless satisfactory adjustment was made at once; that the Canton bank replied that Bell & Co. would not comply with the demand, and asking the Chicago bank if it would sue Bell & Co. instead, provided the Canton bank would cash the judgment at once when obtained, and take an assignment of it; that it was then agreed that the Chicago bank should sue Bell & Co.; that the Canton bank should pay one-half the expense and cash the judgment, when recovered; that a bond with sureties was given by the Canton bank to indemnify the Chicago bank, reciting that the suit was brought at the request of the Canton bank, and that the execution of the bond and the commencement and prosecution of the suit should not discharge the Canton bank as indorser of the drafts.

Defendants claimed that this showed a conspiracy between the Chicago and Canton banks to avoid suit against the Canton bank, and to cut off any defense which the defendants might have against the Canton bank.

The plaintiff insisted that, as purchaser for value, it had a right to enforce its remedies against any party to the paper ; that it did not appear that defendants had any defense against the Canton bank, and that, had it been otherwise, that was unimportant in this action.

It is believed that the foregoing substantially presents the facts and the questions in this case between the parties, as shown by the record.

The court directed a verdict for plaintiff for the amount due on the drafts, as shown by the evidence, including interest, and ten per cent. statutory damages under the law of Illinois.

## BRIEF AND ARGUMENT.

The record shows the charge of the court to the jury. *(Record, p. 192, et seq.)* It shows that plaintiffs in error did not except to any of the rulings therein contained, upon matters of law, or to any part of said charge, except the concluding part, in which the court instructed the jury to find a verdict for the plaintiff below. From the charge, it also appears that the court charged that the evidence establishing certain facts was undisputed. No exception was taken to such rulings.

It is submitted that plaintiffs in error, having failed to except to any portions of said charge, except said concluding part, cannot assign errors upon any other parts of the charge, and that the fifth assignment of error, that the court erred in directing a verdict for plaintiff below, is the only assignment properly before this court for consideration.

It is also submitted that, as no exceptions were taken to the preliminary rulings contained in the charge of the court, and upon which the court based this direction to the jury, the correctness of such rulings cannot be considered, even under such assignment, it being considered, on the part of defendant in error, that so far as said preliminary rulings were propositions of law, each proposition which was considered erroneous, should have been specifically excepted to as matter of law; and that, so far as said preliminary rulings were findings of fact, the defendants below, if controverting, as to any such finding, the position taken by the court that there was practically no evidence to submit to the jury for a contrary finding, should have excepted specifically to such finding, whereupon they would have been entitled to insert in the bill of exceptions, all the evidence offered on that point.

## I.

The first error assigned is, that " The court erred in " holding that days of grace were allowed, and that the " bills of exchange sued upon were protested in due " time."

The two bills dated March 4, 1878, and payable sixty days after sight, were accepted by a writing of the acceptor across the face of each, over his signature, containing the words, " due 21st May." The third bill was accepted in like form, except the words, " due 31st May." (*Record, pp. 106, 107.*) The first and second were protested May 21, and the third May 31.

The only contention of plaintiffs in error in this regard is, that as the law allows three days' grace on said bills, they were not *due* and should not have been presented for payment until three days after the dates named in the acceptances, and that the protest hence was void and inoperative.

In case of a bill payable a certain number of days after sight, the acceptor usually does, and always should, state the date.

1 Parsons on Notes and Bills, p. 282.

Unless the date of acceptance, or the date when the bill was due, as to the acceptor, appears by the acceptance, the bill affords no evidence when it should be presented for payment, and the embarassment of a resort to parol evidence arises. It will not be presumed that the acceptor intended such a result.

This bill, on its face, was made payable sixty days after sight. The law allowed three days' grace, so that the bill was not actually *due* or payable till sixty-three days after sight. The acceptor might, in his acceptance, state the date of acceptance, or he might calculate when, by adding the sixty-three days of acceptance, it would be due. He plainly did the latter, and declared the drafts to be *due*, two on May 21, and the third May 31. His declaration that the bills were due May 21, was a declaration that the sixty days after sight, and the three days of grace expired on that date; since otherwise the bills were not due. On the day the bills were so due they were presented and protested.

The deposition of the acceptor was taken and read in the case. He testified that: "The last three bills, for "800 pounds, 850 pounds and 800 pounds (being the " three bills sued on) *and which matured on 21st May and* "*31st May, 1878*, were dishonored." (*Record, p. 152.*) The instruction of the court upon this question was justified by the evidence. It was as follows:

" As to the first point made, that the bills were pre-" maturely protested, which is equivalent to saying they " were never protested at all, this defense raises a question

" of law upon undisputed facts. The bills each appear " upon their face to have been accepted by Turner, on " whom they were drawn payable, the two first on the " twenty-first and the last on the thirty-first of May, 1878, " and were protested for non-payment on those days. " There is no proof in the record, nor on the bills, nor " has any been offered, tending to show when Turner first " saw these drafts; that is, when they were presented to " him for acceptance. The law applicable to these bills, " giving sixty-three days from the time they were so cited " until they were due—that is, sixty days and three days' " grace—is unquestioned, and admitted to be the law governing the rights of the parties to this paper. This " acceptor saw fit to make his acceptance payable on a " day certain, and I am of opinion that the court must " hold that by the terms of these acceptances he intended " to and did make the bills payable, without further days " of grace, on the days named in his acceptance; and, " therefore, the bills were properly protested for non-payment on the twenty-first and thirty-first days of May. " The law requires, to fix the liability on the drawer of " these bills, that they shall be protested on the day when " they are due, and notice of their dishonor given to the " other party. The testimony in the case shows, and is " undisputed, that notice was given to the Chicago bank, " the plaintiff in this case, of the dishonor of these bills, " by telegraph and by due course of mail, immediately " after they were dishonored, and that the officers of the " plaintiff transmitted this notice to the First National " Bank of Canton, and that the First National Bank of " Canton transmitted it to Humphrey Bell, the managing " partner of the defendant firm. I must, therefore, hold " that these bills were legally and properly protested on " the 21st and 31st, and that the proof, without dispute, " shows due notice of the dishonor of the bills to defendants so as to fix their liability under the commercial " law." (*Record, p. 194.*)

" Where a bill at sixty days' sight was accepted on " September 14, payable November 16, it was held that " November 16 was indicated by the acceptor to be the " absolute date of payment, he having intended to allow "for grace in his calculation, and that presentment on that "day was necessary."

1 Daniel on Neg. Instruments, Sec. 633.
*Kenner* v. *Creditors*, 19 Martin (La.), 540.

As the language of Turner, the acceptor, was equivalent to saying that sixty-three days would terminate on May 21st and 31st, and as he has testified that they did mature on those days and were then dishonored, there was here no disputed fact for the consideration of the jury.

The authorities cited by plaintiff in error to this point are not inconsistent with these positions. They are the following:

*Bank of Washington* v. *Triplett*, 1 Peters, 31.

The above case simply states the elementary proposition, that a bill does not become due until the last day of grace. When the acceptor by his acceptance has declared the bill to be due May 21st, he has declared that to be the last day of grace.

*Cook* v. *Remick*, 19 Ill. 598.

The above case simply held that days of grace, as recognized by the law merchant, are allowed in Illinois; that a bill with a *day of payment appointed on its face* is not due until the third day thereafter.

*Perkins* v. *Franklin Bank*, 21 Pick., 483.

In the above case, the note was dated December 7, 1836, and was payable by its terms "in seven months." As, under the law merchant, a "month" always signifies a calendar month, the seven months expired July 7, 1837. It was contended that grace should have been allowed on the note, and that the action was premature. On the margin of the note was written "due July 7, 1837." It does not appear when or by whom it was written, and it was not a part of the note. The statute provided that on all promissory notes payable at a future day certain, in which there was not an express stipulation to the contrary, grace should be allowed. It was contended that the marginal note was such a stipulation. It was held that the seven months named in the note had not expired until July 7, and, as the action was brought on that day, it was plain that grace had not heen allowed, and that the marginal note, which the evidence showed might have been placed there for convenience as to casting interest, entry on the books, etc., was not intended to be, and was not, such a stipulation.

*Montgomery County Bank* v. *Albany City Bank*,
8 Barbour, 399. Same case, 7 N. Y., 461.

The above cases relate to the rights of parties where presentment for payment was not made at maturity. We do not conceive them to be applicable here.

*Bowen* v. *Newell*, 8 N. Y. 194.

This was an action on a check dated October 5, directing a bank cashier to pay $2,000 " on the 12th inst." The court held that days of grace should have been allowed on the instrument, and that it was not properly demanded and protested on the 12th, any more than it would have been if made payable seven days after date. The correctness of the decision we do not question. When a bill, by direction of the *drawer*, is made payable at a certain time, the law merchant adds to the time three days of grace. When the *acceptor* takes the time fixed by the drawer and the three days' grace, whereby the bill as to him is fully due, he is not entitled to three days' further grace.

*Ivory* v. *Bank*, 36 Mo. 475.

This case was substantially as the preceding.

*Hoover* v. *Wise*, 91 U. S. 313.

*National Bk.* v. *City Bk.*, 103 U. S. 670.

The above cases are not to the point in controversy.

## II.

The second error assigned is that " the court erred in " holding and ruling that the said Bank of London was the " agent of the plaintiffs in error, and of them only."

The latter part of the bill of exceptions, as set forth in the record, is as follows (*Record, p. 191*):

> " Thereupon, the court charged the jury that the " plaintiff was entitled to a verdict in the cause, and " directed them to render a verdict for the plaintiff, for the " sum of ten thousand nine hundred and thirty-seven dollars and thirteen cents damages, being the amount shown " due by the testimony of the witness Boulton, including " ten per cent. statutory damages, which was done accordingly; to which ruling and direction of the court, defendants' attorneys then and there duly excepted, which " charge of the court was as follows:"

Then follows the charge of the court. *(Record, p. 192, et seq.)*

If the exception of the defendants below be regarded as confined to that part of the charge directing the jury to find a verdict for plaintiff for the amount named, then, upon the record, the court did not in terms hold, that the said Bank of London was the agent of plaintiffs in error, and of them only; nor did it so hold in substance, since it was not necessary to directing such verdict for plaintiff, that it should have so held.

If the exception be considered as directed to any part of the entire charge, then its examination discloses that the court nowhere so held. The ruling of the court related, not to the drafts, but to the property pledged for their payment. We shall, therefore, disregard so much of this assignment, and the argument of plaintiffs in error thereon, as relates to the question of agency between the parties, as to the drafts.

The facts shown in evidence, upon which to determine the question of agency as to the property, are as follows:

A copy of the drafts has already been given. They are shown in the record, on page 44. Each was endorsed and delivered by Humphrey Bell & Co. to the First National Bank of Canton, Illinois, by that bank to the First National Bank of Chicago, and by the latter to the City Bank, of London. The current market value of the drafts was paid by the Canton bank to Humphrey Bell & Co. *(Record, p. 101)*, and by the Chicago bank to the Canton bank *(Record, pp. 101, 115)*. The bills of lading, endorsed in blank by Humphrey Bell & Co., accompanied the drafts *(Record, pp. 119, 120)*, as also what were described as letters of hypothecation. The letters of hypothecation appear in the record upon page 126. The drafts, bills of lading and letters of hypothecation reached the City Bank of London, in due course of business. When the bills matured the goods were in custody of the City Bank, of London *(Record, p. 152)*. On May 23, 1878, the London bank notified the Chicago bank, from which it had received the drafts, by telegraph, that the drafts of March 4 had been dishonored *(Record, p. 117)*. On the same day the Chicago bank, by letter, notified the Canton bank of such dishonor. *(Record, pp. 104–117)* The letter contained the following: " Be kind enough to advise me, by wire, what disposition shall be made of the property." *(Record, p. 161.)* The letter came duly to hand, and was shown to Bell. Under his instructions, a telegram was sent by the Canton bank to the Chicago bank May 25, in these words: "Request Alfred Jacks to sell goods for benefit of drafts," and on the same day a letter was sent by the same to the same, as follows:

"Yours of the 23rd received. Upon consultation "with drawers of protested drafts, I have advised you by "telegram, at their request, as follows: 'Request Alfred "Jacks to sell goods for benefit of drafts.' *Jacks & Co.* "*have guaranteed the drawers the payment of their drafts* "*on Turner*. Advise me of any further information you "obtain regarding the matter. I enclose $4.25 for cable-"gram." (*Record, p. 162.*)

May 25, the Chicago bank telegraphed the City Bank of London: "Let Alfred Jacks, Liverpool, sell 7,983, 7,984, under your control." It is conceded that these relate to the property securing the two dishonored drafts. (*Record, p. 122.*) When the third draft fell due, the same steps, substantially, were repeated. (*Record, p. 122.*) Acting, or assuming to act, under these instructions, the London bank turned the bills of lading over to Alfred Jacks to sell, the two first bills May 27, the third June 7. (*Record, pp. 150, 151.*) Jacks proceeded to sell the property, and sold the greater part,—all but seventeen boxes,—and received, prior to September 13, about £2,937. On September 13 he failed. His trustee in bankruptcy sold the seventeen boxes, and accounted for the same to the London City Bank. (*Record, p. 158.*) Both Jacks and Turner having been declared bankrupt, defendant in error proved against Jacks' estate for the amount of meats sold by him, and against Turner's estate for the amount of the bills. (*Record, pp. 156–158.*) The dividends were endorsed upon the drafts, as also the proceeds of the meats recovered from Jacks' estate, and $1,000 paid by Canton bank to plaintiffs in error. (*Record, p. 183.*) The action was for the remainder due on the drafts.

The question under the error assigned is, Was the City Bank of London the agent of defendant in error, with regard to the produce represented by the bills of lading?

The drafts, bills of lading and so-called letters of hypothecation were all parts of the same transaction. All were executed by plaintiffs in error, by them delivered to the Canton bank, by the Canton bank to the defendant in error, and by the latter to the City Bank of London. It was manifestly the intention of all parties that such acts should occur. The letters of hypothecation recite that plaintiffs in error had sold to the First National Bank bills of exchange, and that they had made an agreement with the First National Bank, that if the bills were accepted by the drawers, and the acceptances were satisfactory to the London bank, the latter was to deliver the collateral property to the acceptor. If the drawees did not accept, or the acceptance was not satisfactory to the London bank, or if the bills were not paid at maturity, the London bank was authorized by the instrument to place the goods with *its* brokers for sale, and apply the proceeds on the bills.

Plaintiffs in error originally owned the property. When they made the same collateral to the drafts, it was in their power so to do without imposing any conditions, by way of instructions or otherwise, in which case it would have been the duty of the holder of the drafts, immediately upon the acceptance, to deliver the bills of lading—that is, the goods—to the acceptor.

*Merchants' Bank* v. *National Bank*, 1 Otto, 92.

On the other hand, in pledging the collaterals for the bills, the owners of the property—the drawers of the drafts—had a right to impose any conditions and restrictions they chose, and any parties that should discount the drafts, with a knowledge of such restrictions and conditions, became bound thereby. In any case, the absolute property remained in the original owners, subject to the pledge for the drafts, and any party into whose possession the goods should come was bound to use the proceeds first for the benefit of the drafts, and, next, to account for the balance to the consignors.

In this case, the consignors elected to attach conditions in pledging the property for the drafts. They did so by the letters of hypothecation. By executing said letters, directing them to the City Bank of London, and sending their own instructions to said bank, they made that bank their agent in London, for the control and disposition of the property; and by purchasing the drafts with the bills of lading and letters attached, the Canton bank and the Chicago bank consented to the arrangement stated in the letters. When the drafts, bills of lading and letters reached the London bank, it became the agent of consignors with respect to the property, and accountable to the consignors for the proper execution of such agency. Defendant in error had a right to insist, for its own protection, that the proceeds of the goods when realized, be applied by the City Bank of London, in conformity with the letters, for the benefit of the drafts; but it had no right to interfere with the execution of the agency created by plaintiffs in error in the London bank. It was in no way accountable for the acts or omissions of the City Bank in the matter of its agency, in regard to the property. Its duty was ended when it forwarded the papers to the London bank. It had no duty afterward to perform in the matter, except to refrain from interfering with the execution by the London bank of *its* duty, under the letters of hypothecation. It had no right to select its own agents to dispose of the property. It was bound by its assent to the conditions imposed by plaintiffs in error. The agency and terms of the agency of the London bank, were created solely by the letters of hypothecation made by the plaintiffs in error. The Chicago bank gave no instructions. It had no right to give any.

It is said that the letters of hypothecation set out an agreement by plaintiffs in error with the Canton bank, and not with defendant in error.

This is immaterial. The letters were not only the authority and instructions from plaintiffs in error to the London bank, but the receipt and forwarding of them by defendant in error to the London bank constituted an agreement between plaintiffs in error and defendant in error. The *letters* were not the agreement between plaintiffs in error and defendant in error. They are simply evidences of the agreement. They are not signed by the First National Bank. They do not purport to be its contract. They contain instructions from the consignors to their agent, and they recite that the First National Bank, which holds the drafts and bills of lading, has accepted the conditions they name.

No words of negotiability in the hypothecation papers were requisite. No assignment or transfer by the Canton bank to the Chicago bank was necessary. All that was requisite was, that the bills of lading and letters be duly placed in the possession of the London bank, to whom they were directed, and for whom they were intended. The London bank was to be controlled by the directions given by plaintiffs in error over their signature.

It is urged in argument that the letters of hypothecation show a personal trust reposed in the *manager* of the City Bank of London, instead of the bank itself. That, also, is immaterial. Whether the bank itself, or any special officer of the bank, was created the agent of plaintiffs in error, the questions of agency are the same between the parties to this suit. Some person was selected by plaintiffs in error to control the property—whether the City Bank of London, or one of its officers, is immaterial here.

It is said in argument that the letters were not acted under or relied upon by any of the parties. There is not the slightest evidence shown in the record to corroborate this statement.

The letters were forwarded with the other papers to their intended destination They were held—all of them—for months by the London bank without objection. Of necessity they became binding, by such acceptance and retention, upon that bank. Its receipt of the bills of lading was its receipt of the property, and its receipt and control of the property was subject to, and bound by the letters. No other demonstration that the letters were acted under and relied upon could be necessary.

It is urged by plaintiffs in error, that the interpretation of the letters by the parties is shown by their acts and should control, and that their interpretation is not that of the court.

The letters were made by plaintiffs in error, who arranged that they should reach the London bank with the property. They were forwarded through the intended channels, the Canton bank and the Chicago bank, to their destination with the property. They were binding at once upon the London bank when received. That bank held the meats subject to the letters. Such was the interpretation of all parties by their acts, and such must be the interpretation of the law.

It is stated in argument that the bacon was not placed with the London bank by the plaintiffs in error.

That it was intended by plaintiffs in error that the bacon, represented by the bills of lading, with the letters should reach the London bank; and that they did so reach it, through the intended channels, admits of no question on the record.

The drafts and letters were dated March 4 and 11. The drafts were made payable sixty days after sight. The acceptances fully matured May 21 and 28. The bills of lading were held by the London bank until the maturity and dishonor of the drafts, as authorized by the letters.

Up to the time of the dishonor of the acceptances, defendant in error cannot be charged with any liability in regard to the collaterals, since the City Bank was the sole agent of plaintiffs in error in regard thereto. When such dishonor occurred, the letters of plaintiffs in error provided for the emergency. They authorized the London bank to place the goods in the hands of its broker for sale. It was then competent for the London bank so to do. It was also in the power of plaintiffs in error, the pledgors, to make any other arrangement in regard to the disposition of the property, provided such plan had the sanction of the other parties in interest, the defendant in error, who relied upon the collaterals as a means of payment, and the Canton bank, which was liable as an endorser of the drafts. In view of the changed condition of affairs, arising from failure of the acceptor, defendant in error, in transmitting notice thereof to the Canton bank, from which it received the drafts and other papers, in its letter, made this inquiry: "Be kind enough to advise me what disposition shall be made of the property." It did not undertake to decide, itself, since it was without authority to change the terms of the pledge, but it made the inquiry of the party from whom it received the documents. This letter to the Canton bank was dated May 23. The Canton bank being also without authority to modify the pledge, applied to the pledgors, plaintiffs in error, for any directions requisite. (*Record, p. 176.*) At the direction of consignors, the following dispatch was sent by the Canton bank and plaintiffs in error to defendant in error, May 25: "Request Alfred Jacks to sell goods for benefit of drafts." (*Record, p. 176.*) The liability of Turner, as acceptor, had operated as a sufficient motive to plaintiffs in error to entrust him with the sale of the property, if such course should also have the approval of the London bank. His dishonor of the acceptances ended his possible employment in the sale of the property. Jacks' relation to plaintiffs in error was a sufficient reason why they should desire that he should control the sale. The instructions to let him sell the goods for the benefit of the drafts, when communicated, operated as the employment of Jacks as the agent of plaintiffs in error. It was their modification of the terms of the original agency, and the forwarding of the directions by the Canton bank to the Chicago bank, and by the latter to the London bank, was the assent of the Canton bank and the Chicago bank to such modification.

We insist, then, that had the Chicago bank forwarded, as the Canton bank did, the instructions of plaintiffs in error, without change, and had exactly that occurred, with reference to the property, which did occur, the London bank and Jacks were both the agents of plaintiffs in error, and not of defendant in error, with regard to the property; and that defendant in error was in no way responsible for their acts or omissions.

May 28, after the receipt of the instruction from plaintiffs in error through the Canton bank, defendant telegraphed the London bank: " Let Alfred Jacks, Liverpool, sell property under your control;" and on June 6, after further instructions to the same purport from plaintiffs in error: " Let Jacks, Liverpool, sell property against draft on Turner, under your control." *(Record, p. 162.)*

This dispatch is capable of two renderings. The words " under your control " may have been used descriptively of the property, as meaning the property which is under your control. In such case, the dispatch forwarded was identical in meaning with that received. Or it may be interpreted as meaning: " Let Jacks sell the property; but let him do it under your control."

Did this modifieation end the agency of the London bank for plaintiffs in error, and convert it into an agent for defendant in error?

If the modification of the form of the instructions from plaintiffs in error had any effect upon the meaning thereof, it was to continue the original agency, not to destroy it. Under the letters of hypothecation, the London bank had control of the matter. It was authorized to put the property in the hands of brokers selected by itself, and to apply the proceeds on the drafts. The language of the dispatch sent by the defendant in error may mean that the original agency was to still exist, except that instead of the London bank's selecting a broker, one was designated by plaintiffs in error, with the assent of the parties in interest. Humphrey Bell, the senior member of plaintiffs in error, testifies that this was his intention in the dispatch which he directed. (*Record, p. 176.*) The intention, then, of plaintiffs in error, was that their dispatch should, in fact, have the significance which, if not already sufficiently expressed, was given it by the words added by the Chicago bank. Plainly, then, this modification had no effect to terminate the original agency of the London bank for plaintiffs in error, or to modify the agency, except as intended by plaintiffs in error.

That is:

Plaintiffs in error were the owners of the meats. The defendant in error had advanced money upon them to the amount of the drafts, at the fair commercial rate of foreign exchange, and had a lien on the property for the advances. The meats were pledged for the payment of the drafts, though the method of realizing upon the property, the manner of its sale, the agents through which the sale should be executed, were regulated and controlled by direction of the plaintiffs in error, to which defendant in error assented, on acquiring the drafts with the pledges therefor. If the meats were lost by any act not the act of the Chicago bank, it was the loss of plaintiffs in error, and their liability upon the drafts was not released. Upon the dishonor of the acceptances, the London bank was clothed with ample discretion, by the letters of hypothecation from plaintiffs in error, to place the goods in the hands of any broker selected by it for sale. The only effect of the dispatch, as it came from plaintiffs in error, was to desiginate the broker into whose hands the goods should go. It was the intention of plaintiffs in error that the goods should be sold under the control of the London bank. Defendant in error had a right to insist that there should be no modification in that respect of the original authority, by which the goods were pledged in its favor.

It expressed in its dispatch the exact meaning which plaintiffs in error intended, and which it had a right to express, had they not so intended. The complaint of plaintiffs in error is, that the goods were not sold by Jacks under the control of the London bank, but that it abandoned all control of them to Jacks. If the claim is made that defendant in error is responsible for this, because it changed the meaning of the dispatch by adding "under your control," the answers are, first, that plaintiffs in error testify that such change did not alter, but exactly expressed their intention; next, that the instruction was not regarded, and the City Bank executed the dispatch as prepared by plaintiffs in error; and, therefore, no injury occurred through the modification; and, finally, that so far from procuring such result and defeating the intention of plaintiffs in error in their direction to their agent, defendant in error took care to have it executed in spirit and in substance. Whether the City Bank of London misconstrued or disobeyed the instructions of plaintiffs in error, or failed fully to perform them, is a matter between the principal and agent, plaintiffs in error and the London bank, for which defendant in error is in no way responsible. The same is true of the acts and omissions of Jacks, for the reason that both parties were the agents of plaintiffs in error in regard to the property, and were not the agents of defendant in error.

When the Chicago bank discounted the drafts, with the knowledge of the bills of lading and letters of hypothecation, it acquired the security which all the papers gave it. It obtained its rights upon the drafts, and it obtained security, subject to such agency as it found already imposed by the acts of plaintiffs in error. It had not a complete title to the property, as insisted. The ownership remained in plaintiffs in error, subject to the pledge for the drafts, and defendant in error acquired a special title as pledgee, subject to all the conditions of the pledge, of which it had notice. Such is the doctrine of

*Dows* v. *Milwaukee Bank*, 91 U. S. 618.

The attempt to construe an instrument signed by plaintiffs in error alone, by which they arranged for the sale of their own property through an agency which they then created, as the employment of such agent by the Canton bank, or by defendant in error, seems to us an unreasonable and unnatural interpretation.

We have no occasion to quarrel with the language of Story on Agency, section 38, and *Insurance Co.* v. *Scott*, 1 Johns. R. 110, cited by counsel, to the effect that where parties have a joint interest, they may employ a joint agent, and that loss through the negligence of such agent must be borne proportionately. That doctrine has no application to this case. The *letters* gave no interest in the property to the Canton or Chicago banks. Such interest as they had they acquired by possession of the bills of lading, as pledgees. That interest was limited by the hypothecation letters, in the way therein stated; so that they acquired no title to the property, but only to have the proceeds of the property, when realized, applied upon the drafts.

The interpretation and construction of the letters of hypothecation made by the court below is in conformity with the acts and conduct of the parties. The letters and bills of lading are unambiguous, and they were acted upon. They went to the London bank. Under them the London bank retained possession until the drafts were dishonored. Then, by action of plaintiffs in error, Jacks was made their agent. Through the action, or negligence, of one or both of these agents there was a loss. That the Canton bank and the Chicago bank, having discounted or being liable upon the drafts, were interested in the results of the sale, is no reason for converting them into principals in the matter.

The position of plaintiffs in error upon the question of agency, and the inferences they derive from it, are somewhat extraordinary. They are briefly stated upon page 19 of their argument, as follows:

" When the drafts were delivered to the Canton bank " there was, at the same time, delivered with them property " belonging to plaintiffs in error of the value of more than " the amount of the drafts."

This was not an absolute delivery. It was limited by the hypothecation papers. The Canton bank and the Chicago bank had no right to convert or use the property.

They were entrusted with the bills of lading, but only for the purpose of forwarding them to the destination provided by plaintiffs in error. They could neither use nor sell the property, nor control its sale or use. They were only entitled to so much of the proceeds, when the property was sold by the agents of plaintiffs in error, as their drafts called for.

Their argument continues: " This property was de-" livered with the drafts by the Canton bank to the Chi-" cago bank, and by the latter to the London bank."

It reached the London bank because, under the directions imposed by plaintiffs in error, it could not go elsewhere.

Then follows their assertion: " The property and " proceeds were lost by the negligence and misconduct of " the London bank."

The evidence shows that it was lost through the defalcation of their trusted agent, Jacks.

Then they state the alleged misconduct and negligence of the London bank, as follows: "Had that bank "retained the possession and control of the property, *as it* "*was expressly directed to do by the defendant in error*, no "loss would have occurred. But the London bank did not "comply with *such* instructions, and therefore, by reason "of negligence and a total disregard and violation of "instructions, the loss arose."

Is not this argument self-destructive?

When plaintiffs in error were asked by defendant in error what disposition should be made of the bacon, they did not answer that defendant in error, either alone or jointly with them, ought to direct. Their order was peremptory: "Let Alfred Jacks sell the meats." He was their own chosen agent. They selected him because their relations with him induced them to repose the highest confidence in him, because in their dealings he had guaranteed payment of these very drafts; because, looking to the substance of their dealings, he was an acceptor of the drafts; because he was interested in making the property discharge his own liability. At any rate, they chose him of their own free will, and he became their individual agent.

The loss connected with the property arose out of his acts. He did sell the property, but he did not pay over the proceeds. He violated the trust they had placed in him, and, instead of paying over the money, spent it for his own purposes. *Here*, by the conduct of Jacks, is their loss.

But to claim that defendant in error is responsible for the shortcomings of their own trusted agent (Jacks), abashes the courage even of plaintiffs in error. They, therefore, tacitly admit that Jacks was their agent, and they say he ought not to have had custody of the property; that they meant he should be their broker, not their factor. Well, who is to blame for this? They, themselves, deliberately prepared the instructions. If these were not explicit and intelligible, they alone are to blame. They cannot pretend that defendant in error did anything to thwart their intentions. On the contrary, they say, and it is proved, that it sought to promote their intention. As they directed that Jacks sell, without saying as broker or factor, it is the result of their own negligence if he was used as a factor.

But they say the London bank was negligent, in not obeying the restriction added by defendant in error, " under your control." If the London bank disobeyed the directions of defendant in error, is that fact any reason why defendant in error should be liable for the consequences of such disobedience? If the defendant in error expressed what plaintiffs in error intended, but negligently omitted to express in their dispatch, on what principle of law or ethics is defendant in error to be subjected to liability?

But they say that Jacks sold the bacon between May 27 and June 7, and that the London bank did not call on him to account for proceeds until August 22, and they intimate that had the London bank pressed him more vigorously for the proceeds, any loss through him might have been avoided.

In the first place, this is a wholly gratuitous assumption; next, it was the business of their agent (Jacks) to turn over the proceeds to the London bank. Plaintiffs in error had given no instructions to the London bank to enforce collection. But, assume that it was its duty so to do without instructions. What has defendant in error to do with that? The London bank was the agent of plaintiffs in error, and acting under their explicit written instructions. Is defendant in error to be charged with the negligence of one agent of plaintiffs in error, in not watching with sufficient care the acts of another agent of plaintiffs in error?

## III.

The third error assigned is, that " the court erred in " holding that the endorsements in writing upon the drafts " could be altered, contradicted, and their effect varied by " parol proof, and in permitting parol proof to be intro- " duced for this purpose."

The first endorsement upon the drafts is,

" Pay to the order of the First National Bank of Canton, Ill.

" HUMPHREY BELL & CO."

(*Record, p. 106.*)

The evidence admitted in regard to this, was that of Willard *(Record, p. 131)*, to the effect that this special endorsement over the signature was put on by him after the commencement of the suit, and before the filing of the declaration, by direction to him from the attorneys of defendant in error.

The fact shown by his testimony was undisputed.

There was testimony tending to show that there was an arrangement between plaintiffs in error and defendant in error, whereby the drafts were discounted by defendant in error upon a request previously made by plaintiffs in error, to which defendant in error had assented, provided the drafts should have the endorsement of the Canton bank. *(Record, pp. 101, 114, 115, 117.)* The assignment of error does not relate to the conclusion reached by the court in the premises, and simply raises the question whether the above testimony was admissible to establish the actual facts in regard to the endorsement.

The next endorsement was,

> " Pay First National Bank, Chicago, or order, for col-
> " lection account of First National Bank of Canton, Ill.
> " C. T. HEALD, *Cashier*." (*R. 106.*)

Testimony was admitted tending to show that, in fact, defendant in error discounted, that is, purchased, the notes, paying for them their full commercial value, and did not take them for collection on account of the Canton bank. The question under the assignment is, was it competent to show the actual facts of the transaction in this suit?

We do not dispute the general proposition, that when parties to a contract have deliberately put their engagements into writing in such terms as to import a legal obligation, without any uncertainty as to the object or extent of their engagement, it will be conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing. Nor is it necessary for us to, nor do we, dispute that this general proposition applies as well to the making and endorsement of notes and drafts as to other contracts.

But the rule applies only to the *parties to the contract and privies*. Where *A*. and *B*. contract in writing, their contract concludes them. When the rights of *C*. are concerned, he is not concluded by the language they have seen fit to employ, or have happened to employ. He may ascertain the actual facts and base his rights and liabilities thereon, and not on the words or falsifications of others. In this case, had the endorsement of the Canton bank to defendant in error shown a purchase by defendant in error, and had the fact been that it was not a purchase, plaintiffs in error could have established such fact. This is a well-established principle.

It is thus stated in *1 Greenleaf on Evidence*, Sec, 279:

" The rule under consideration is *applied only* (*in suits*) " *between the parties* to the instrument, as they alone are " to blame if the writing contains what was not intended, " or omits that which it should have contained. It cannot " affect third persons who, if it were otherwise, might be " prejudiced by things recited in the writings contrary to " the truth, through the ignorance, carelessness or fraud of " the parties, and who, therefore, ought not to be pre- " cluded from proving the truth, however contradictory to " the written statements of others."

And the rule is reciprocal. In a contest between either party to a contract and one not a party or privy to it, the former may show the actual facts, and will not be concluded by language which, while it may sufficiently express the facts for the purposes intended between the parties, may not speak the truth upon the whole matter. The rule is well stated in

*McMaster* v. *N. A. Ins. Co.*, 55 N. Y. 234.

In this case, the witness Lake was asked whether certain described property was the same as that mentioned in the policy sued on. The court says:

" It was objected that it was incompetent for the " witness to state whether it was or not; the description " should control. We understand this objection to raise " the point that Lake, being a party to the contract of " insurance containing this description, could not contra- " dict it by parol. The rule that testimony may not be " given to contradict a written contract, is applied only in " suits between the parties to the instrument, or their

" privies. The parties to a written instrument have made " it the authentic memorial of their agreement, and for " them it speaks the whole truth upon the subject matter. " It does not apply to third persons, who are not precluded " from proving the truth, however contradictory to the " written statements of others. Strangers to the instrument, not having come into its agreement, are not bound " by it, but may show that it does not disclose the very " truth of the matter, and, as in a contention between a " party to an instrument and a stranger to it, the stranger " may give testimony by parol, differing from the contents " of the instrument, so the party to it is not to be at a " disadvantage with his opponent, and he, too, in such " case, may give the same kind of testimony. (*Badger* " v. *Jones*, 12 Pick. 371; *Reynolds* v. *Magness*, 3 Iredell, " 26.)"

To the same effect are

*Lee* v. *Adsit*, 37 N. Y. 28.
*Lowell Mnfg. Co.* v. *S. F. Ins. Co.*, 88 N. Y. 599.
*Edgerly* v. *Emerson*, 23 N. H. 565.
*Needles* v. *Hanifan*, 11 Ill. App. 307.
*Masterson* v. *Boyce*, 29 Hun. 456.

In this case undisputed evidence established that, instead of defendant in error being an agent and collector for the Canton bank, it purchased the drafts and passed the proceeds at once to the credit of the Canton bank, and that plaintiffs in error received the same from the Canton bank. Plaintiffs in error are not parties or privies to the contract of endorsement between the Canton bank and defendant in error. They had a right to depend upon the actual facts determining whether defendant in error was a collector for the Canton bank, or was the purchaser and owner of the drafts, and defendant in error had the same right to show the actual relations. There is no estoppel operating against them. The authorities cited by plaintiffs in error are not inconsistent with this well-established rule. Those authorities are the following:

*Brown* v. *Wiley*, 20 How. 442.

This was an action by the payee and holder of a draft, payable May 1, 1855, which was protested for non-acceptance, against the drawer. The defense asserted was a parol agreement, between the payee and the drawer, that the draft should not be presented for acceptance till a certain other draft was provided for in a certain way. The drawing and delivering of the draft, by the drawer to the payee, constituted a contract between the drawer and payee, and *the action was between the very parties to that contract*. The court held, that parol evidence could not be introduced by either of *said* parties in an action between them on the contract, whereby to change the form or meaning of the contract.

*Specht* v. *Howard*, 16 Wall. 565.

The above was a suit by the endorsee of a negotiable note, which had no place of payment specified in it, against the payee, who was the endorser. The endorser relied, for his defense, upon a confessedly fruitless demand of the maker; that is, upon a fruitless demand in New York, where the maker did not live. Parol evidence was offered to show that when the note was drawn, it was agreed between the maker and the *endorsee* that the note should be payable in New York, and that this had been omitted, by mistake, in drawing the note. The court held that the evidence was improper. The defendant offered to show that he had not consented that the note should be payable in New York. That is to say, the plaintiff, endorsee, attempted to vary a written contract *between the maker and the payee* (the defendant), by showing an agreement between the maker and endorsee, to which the defendant was not a party and did not assent, and so to affect the liability of such payee, as endorser. A third party was not permitted to create a liability in the payee, by making a contract to which payee was not a party, and of which he had no knowledge.

*Martin* v. *Cole*, 104 U. S. 30.

The above was an action by an endorsee against the endorser of a note, upon his blank endorsement. The defense offered was a contemporaneous parol agreement, that the endorsement was without recourse. This was held inadmissible, as varying the written contract, which the blank endorsement created, between those who were *parties both to the contract and to the suit.*

*White* v. *National Bank*, 102 U. S. 658.

The above was an action by endorsee against endorser upon several drafts. The drafts and endorsements were as follows:

" $5,000. Office of the Stewart Silver Reducing Co.,
" GEORGETOWN, COL., Oct. 25, 1875.

" Four months after date, pay to the order of the " Miners' National Bank, Georgetown, Colorado, payable " at the third National Bank, New York City, five " thousand dollars."

" STEWART SILVER REDUCING COMPANY,
By J. OSCAR STEWART, *President.*
" *To Thos. W. Phelps, Esq., Georgetown, Colorado.*"

Across the face in red, " Accepted.—Thos. W. Phelps."

Indorsed : " Pay S. V. White or order, for account Miners' National Bank, Georgetown, Colorado.

" J. L. BROWNELL, *President*.
" S. V. White."

Brownell was president of the Miners' National Bank. There were special counts upon the drafts and the common money counts. Because of the words, " for account of Miners' National Bank of Georgetown, Colorado," in the endorsement, the Circuit Court ruled that there arose out of the transaction no obligation on the part of the bank to pay the drafts or return the money, and there was judgment for the defendant. This court said (p. 660):

" The plaintiff relies largely on two propositions to " establish his right to recover against defendant on this " endorsement.

" The first of these is, that these words are merely " directory, and capable of explanation, and when it is " shown by parol testimony, as in this case, that the " plaintiff bought and paid full value for the draft, with " the understanding that he was buying it as commercial " paper, with the usual incidents of such a transaction, the " endorser is liable in the usual manner, notwithstanding " the words we have quoted. * * *

" We are not satisfied that this proposition is sound.

" The language of the endorsement is without am-" biguity, and needs no explanation, either by parol " proof or by resort to usage. The plain meaning of it " is, that the acceptor of the draft is to pay it to the en-" dorsee for the use of the endorser. The endorsee is to " receive it on account of the endorser. It does not pur-" port to transfer the title of the paper or the ownership " of the money when received. Both these remain, by " the reasonable and almost necessary meaning of the " language, in the endorser. It seems to us that the court

" below correctly construed the effect of the endorsement
" to be to make White the agent of the bank for the collection of the money.

" If this be a sound view of the legal effect of the
" written endorsement, neither parol proof nor custom
" can be received to contradict it.

" But we are aware of the necessity of proceeding
" with great caution in a case of first impression in regard
" to questions affecting commercial transactions, and we
" do not, therefore, decide this one, because we do not
" think it absolutely necessary to the case. For, assuming this to be correct, we think the plaintiff was still
" entitled to recover more than he did."

The court held that the evidence was competent under the money counts, and therefore reversed the case.

It will be noticed that the object of the parol evidence offered, and upon which there was no decision by this court, although an opinion was expressed, was to vary the terms of the written contract *between the very persons who were parties at once to the contract and to the action.*

*Mechanics' Bank* v. *Valley Packing Co.*, 4 Mo. App., 201.

Same case, 70 Mo. 643.

The above was an action by the Mechanics' Bank against the Valley Packing Co., upon a draft drawn by the latter upon Ashbrook & Co., payable to order of cashier of First National Bank of St. Joseph. The draft was endorsed:

" Pay James T. Harvenstein, Esq., cashier, or
" order, for collection, for account of First National Bank,
" St. Joseph, Mo.

" JOS. C. HULL, *Cashier.*"

Ashbrook & Co. were indebted to the Valley Packing Company to the amount of the draft, and had requested the latter to draw upon them for the amount, upon which draft they would raise the money and remit it to drawer on account of its claim. Under these circumstances, the draft was drawn, the endorsement made, and the draft delivered to Ashbrook & Co. The latter accepted it, and offered to plaintiff for discount. *By the consent of plaintiff and Ashbrook & Co.*, the entire endorsement above, including the signature, was stricken out. Plaintiff then discounted the draft and paid the amount to Ashbrook & Co., who remitted it to the Valley Packing Co. The action was on the draft, by the bank which had discounted the draft, against the drawer, the Valley Packing Co. The court held that the erasure of this restrictive endorsement of the payee and endorser, which was the agent for collection of the Valley Packing Co., without knowledge or assent of the latter, destroyed the validity of the draft as to it, and that plaintiff, being a party to such destruction, was bound to know that such was its effect. The court says:

" The appellant is driven to maintain that the action " is and is not upon the bill. The difficulty of this case " is, that it is forced, in order to get title to the bill, to " resort to the facts that destroy its title. Accordingly, " in declaring on the bill, in place of setting out the con- " tract as it is, the appellant omits a part, substitutes a " parol agreement in order to do away with the legal " effect of the bill, and seeks finally to recover, not on the " bill, but on a contract which it can establish only by " parol evidence, and which is negatived as soon as the bill " is produced. * * Appellant shows no " title to the bill. It originally belonged to respondent. " How did the title pass to the appellant. The payee did

" not endorse it, nor was there any endorsement to appel-
" lant. The latter is in the position of a party who buys
" an unendorsed bill. The erasure made by the common
" consent of Ashbrook & Co. and the appellant evinced
" their determination to make a new contract of their own.
" The respondent had plainly signified, by the endorse-
" ment of its agent and banker, what its contract was, and
" upon what terms it was willing to let its name go forth
" upon the bill. These terms, proposed upon the bill
" itself, were not accepted, and to any new terms there is
" no evidence that the respondent assented. The effect
" of the alteration of the bill, without the consent of the
" respondent, was to destroy the validity of the bill as to
" the respondent."

In the case now before the court, had the endorsement of the Canton bank been to pay the defendant in error for the use of plaintiffs in error, and had some other bank discounted the drafts at the request of plaintiffs in error, the drawers striking out the endorsement of the Canton bank entirely, there would have been a similarity, in form and principle, between this case and the one last above cited.

### *Forsythe* v. *Kimball*, 91 U. S. 291.

The above action was a bill by complainant Forsythe, against the assignee of a bankrupt insurance company. The company was indebted to complainant in about $1,100. The object of the bill was to have the amount due complainant from the insurance company set off against certain notes—some signed by him alone, some by him jointly with others, and some signed by others, but not by him. It was sought, by parol evidence, to establish that, in fact, the loans made by the company were, in reality, all loans to him, and not to the others, although all had given a mortgage and although the notes of others were taken, as stated. A set-off was allowed by the court below, as to his individual notes, but not as to the others, for want of mutuality between the parties. This court sustained the decision. The principles involved in the case do not touch the question in controversy here.

*Burnap* v. *Cook*, 32 Ill. 169.

The above was an action against the maker of a promissory note. The payee indorsed it in blank and sold and delivered it to Miller. Miller did not wish to sue it in his own name, and requested Cook, the plaintiff, to let the suit be brought in his name. Cook assented, and the blank endorsement was filled up by writing over the payee's endorsement, "pay to W. C. Cook." The plaintiff had no other interest in the suit. The plaintiff's right to maintain the action was sustained. The case has no relevancy to the question involved here.

This assignment of error does not raise the question as to what the evidence establishes. We have not, therefore, in this connection, considered anything but this question of admissibility.

In the brief for plaintiffs in error, under this assignment, various correspondence is set forth between the Canton bank and defendant in error. It has no bearing upon the question of admissibility of evidence made by the assignment, nor does it have any, even the slightest, tendency to show that, as between the Canton bank and defendant in error, the latter was not a purchaser. So far as it throws any light upon the transaction, it tends to establish the fact of purchase.

## IV.

The fourth error assigned is, that "The court erred in "including in the finding statutory damages under the "statute of Illinois."

It is claimed under this, first, that the drafts were not duly protested. By this is meant that the protest was premature, and, consequently, no legal protest.

We have sufficiently answered this point in connection with the first assignment of error.

It is next claimed that due notice, under the act, was not given. It is not contended by plaintiffs in error that if the demand and protest were made in apt time, the protest and notice to drawers was not sufficient to charge them upon the draft. That is not controverted. But it is contended that the statutory damages are in the nature of a penalty, and that the notice of protest was not such notice as to make the drawers liable for this penalty. It is said that *Humphrey Bell & Co.*, the drawers, consisted of three persons, and that no notice was given to the two Whitnahs, members of the firm. The statute is as follows:

> "Whenever any bill of exchange drawn or endorsed "within this State, and payable without the limits of the "United States, is duly protested for non-acceptance or "non-payment, the drawer or endorser thereof, due notice "being given of such non-acceptance or non-payment, "shall pay said bill, with legal interest from the time such "bill ought to have been paid, until paid, and ten per "cent. damages in addition, together with the costs and "charges of protest."

The provision is, that upon due notice being given, the drawer shall pay the bill and the ten per cent. damages. Counsel claim that in an action on a draft signed in a partnership name, the damages fixed by this statute cannot be recovered unless notice of protest has been given to each partner. No authority is cited for this, and we can hardly think it is seriously urged. The claim in this case is upon the drafts themselves, as having been duly protested. The ten per cent. damages, fixed by the statute, is not a penalty or in the nature of penalty, but is commutation for damages and re-exchange. The right of such recovery was recognized by the law merchant. The mercantile usages of this country fixed ten per cent. as, or for, re-exchange. The statutes of the various States have adopted the mercantile law and the usage, and have fixed the amount.

1 Parsons Notes & Bills, 652, 653, 662.
*Lloyd* v. *McGarr*, 3 Barr. 474.

In *Bank of U. S.* v. *United States*, 2 How. 711–713, McLEAN, J., remarked that the damages on bills of exchange given by the statute are as much a part of the contract as is the interest.

The same notice which would allow a recovery of principal or interest in an action on the draft, allows a recovery of the damages.

## V.

The fifth assignment of error is, that " The court erred " in admitting testimony offered by plaintiff below, and " excluding evidence offered by defendants below."

Heald was asked whether the special endorsements on the drafts were there when he sent them to defendant in error *(Record, p. 101)*, and Willard was asked to state if he knew when the special endorsement was placed there. *(Record, p. 131.)* The court permitted the questions to be answered. It was competent and proper for the court to admit testimony to show the actual facts attending the transaction. If this special endorsement was written by plaintiffs in error at the time they parted with the drafts, it was proper to show such fact. If it was placed there afterward by their agent, or under instructions from them, it was competent so to show. If it was placed there without any authority from them, or if it was put there by defendant in error or by its agents, or, if it was written by some stranger without authority from any party in interest, it certainly must have been a proper subject of inquiry. The testimony was admissible. The use that should be made of it, and the conclusions that should be derived from it, we consider elsewhere.

Heald, cashier of the Canton bank, was asked whether, in fact, the drafts were sent by the Canton bank to the Chicago bank for collection, on account of the Canton bank; also, if he knew whether they were sent for collection or not *(Record, p. 112);* also, to explain why, in the endorsements and the accompanying letters, the words " for collection and credit " were used.

Gage, cashier of the Chicago bank, was asked how the drafts came to be sent to that bank. *(Record, p. 105.)* In answer, he stated, against objection of defendants below, that Boulton, who had charge under him *(Record, pp. 114–132)* of the exchange department of the bank, came to him some time prior to the protest of these drafts, and informed him that a representative of the firm of Humphrey Bell & Co. (plaintiffs in error) was in his (Boulton's) department of the bank, proposing to negotiate with the bank bills of exchange upon parties in Great Britain, saying that such bills would be negotiable there, and would bear the endorsement of the Canton bank; that he told Boulton that he might close such arrangement; that the Chicago bank would discount such bills in the course of business with Humphrey Bell & Co., if endorsed by the Canton bank, and that in pursuance of this arrangement, the bills came into the hands of defend-in error. *(Record, pp. 114, 115.)* This was corroborated by Boulton. *(Record, p. 132.)*

Gage was also asked what was the nature of the transaction so far as the Chicago bank was concerned, whether it received the drafts for collection on account of the Canton bank; also whether the drafts were purchased by the Chicago bank in the due course of business, or, rather, in pursuance of that arrangement made with defendants, or their agent, to which he had testified. He answered that they were purchased in pursuance of arrangements with defendants below, which he had already mentioned.

The competency of the foregoing testimony, admitted against the objection of defendants below, so far as it tended to show the actual relations between defendant in error and the Canton bank, has already been discussed. We shall not repeat the argument. The conclusions to be derived from the testimony we shall consider under the next assignment of error.

Next, as to said evidence relating to the conversation between Gage and Boulton, to which objection was made:

Boulton testified to a conversation he had with Bell, or parties representing him, prior to the discount of the drafts, in regard to future discounts; that he communicated this conversation to Gage at once, and that afterwards drafts of Bell & Co. came, bearing the endorsement of the Canton bank. (*R., pp. 132–133.*) The testimony of Gage was that Boulton informed him as stated, and that he, the superior officer of the bank, assented to the arrangement. The testimony was a part of the *res gestæ* which resulted in the discounts. The object of the testimony was to ascertain whether the arrangement proposed by Bell, or his representative, to Boulton was communicated to the manager of the bank, and whether, on behalf of the bank, he assented to it. The objection to the evidence is that it is hearsay, and not original evidence.

The distinctions between the two are defined as follows, in

1 Greenleaf on Ev., secs. 100, 123.

" It will be proper to distinguish more clearly between " hearsay evidence and that which is deemed original; for " it does not follow, because the writing or words in question are those of a third person, not under oath, that " therefore they are to be considered as hearsay. On the " contrary, it happens, in many cases, that the very fact " in controversy is, whether such things were written or " spoken, and not whether they were true; and, in other " cases, such language or statements, whether written or " spoken, may be the natural or inseparable concomitants of the principal facts in controversy. In such connection, it is obvious that the writings or words are not " within the meaning of hearsay, but are original and independent facts, admissible in proof of the issue.

" There are four classes of declarations, which, though " usually treated under the head of hearsay, are in truth " original evidence; the first class, consisting of cases where " the fact that the declaration was made, and not its truth " or falsity, is the point in question; * * * the " fourth class, embracing all other cases, where the declaration offered in evidence may be regarded as part of " the *res gestæ.*"

On another ground the testimony was competent. The application was to Boulton, a subordinate officer. It may be presumed that Boulton was authorized, as the agent of the party making the application, to communicate it to his superior officer. The fact that he did so was legitimate testimony.

An objection is made as to the form of the question; that is, Heald was asked whether, in point of fact, the drafts were sent for collection on account of the Canton bank, and Gage was asked whether the drafts were purchased in due course of business, and what was the nature of the transaction.

When Heald was asked this question he had already testified that he had received the drafts from plaintiffs in error, with instructions to send them for sale; that he received the proceeds of the sale from the Chicago bank, and paid the same to the plaintiffs in error; that is, he had already shown, by testimony which is uncontradicted, that the transaction was a sale and that the defendants below had the proceeds of the sale, and that the opposite theory, that the Chicago bank took the drafts for collection on account of the Canton bank, was impossible and had no foundation in fact. In his answer to the question objected to, he replied that he did not understand that they were sent for collection for credit (*Record, p. 102.*) It is submitted, that the question in form was proper in this connection. It is almost elementary in its terms. If it were objectionable in form, still plaintiffs in error sustained no injury, since the answer was but a repetition of testimony which the witness had already given, without the objection of the defendants below.

When Gage was asked as to the nature of the transaction, he replied that the bank bought the drafts and gave full equivalent therefor. (*Record, p. 116.*) To the other question put him, he said the bank purchased them in pursuance of the arrangement he had mentioned. (*Record, p. 117*). He had already stated that on the days when the bills were received by his bank the whole value of them was by his bank paid to the Canton bank. His answers to the question objected to added nothing to the testimony he had already given without objection.

Next, as to the ruling of the court, on refusing evidence offered by defendants below.

It had appeared in evidence that notice of protest of the drafts was given to the Chicago bank by letter; that this was communicated by the latter to Bell. It was shown by Gage, in answer to questions put by counsel for defendants below, that he had received telegrams from Heald, reading, " Let Alfred Jacks sell goods for benefit of drafts." (*Record, p. 123.*) Defendants below then called Bell, and proved by him that the telegrams were sent exactly as directed by him. (*Record, p. 176.*) They then recalled Heald, and interrogated him as to conversations between him and Heald about the meats, had at the time the dispatch was sent. (*Record, p. 180.*) If the conversations to which these questions were pointed had any relevancy, their purpose was to modify the telegram. It was not claimed, nor was any testimony offered tending to show, that the conversation ever was communicated to the Chicago bank, or to any one. The telegram was prepared by Bell, who owned the property subject to the pledge. It was prepared and sent as an instruction, and was acted on as such. Surely, anything said between Bell and Heald, inconsistent with it, and never communicated to the Chicago bank or to the London bank, could, under no circumstances, be admissible in evidence. And questions to Bell, of the same purport, were equally inadmissible.

Bell testified, on his own behalf, that he had drawn other drafts in the same manner with Heald; had done so while a member of Ingersoll & Bell; that it was perfectly understood between him and Heald that the meats represented by the bills of lading were not given up (*Record, p. 173*). This testimony was irrelevant, but it was admitted, no objection being made. He was then asked if any of the meats represented by the bills of lading had been given up, to his knowledge. The court excluded the question. A sufficient reason for such exclusion was that he had already answered it. Another reason was that if it applied to former transactions it was irrelevant; if to the transactions in controversy, the dispatch concluded him. The same may be said of the questions to him on pages 174, 176 and 177 of Record.

The questions upon Record pages 177 and 178 were, whether the partners of Bell knew in regard to the drafts by Bell in the firm name against consignments of firm produce, whether Heald conferred with them before drawing the drafts, and whether they individually signed the drafts.

There is no evidence tending to show that any arrangements, as to drawing the drafts, had between the different members of the firm of Humphrey Bell & Co., or any arrangements or agreements had between said firm and Heald, or said firm and the Canton bank, ever in any way came to the knowledge of defendant in error, and for this reason the proof was clearly inadmissible.

## VI.

The sixth assignment of error is, that " The court " erred in taking the case from the jury, and in refusing to " permit the jury to pass upon controverted questions of

" fact, and in refusing to instruct the jury as requested by " attorneys for defendants below."

It is submitted that, under the record, this is the only proper assignment of error made by plaintiffs, and that, under this, the preliminary rulings of the court which necessitated his final conclusion cannot be considered.

Under this, it is claimed by plaintiffs in error, first, that whether days of grace were included in the time named by the acceptor—that is, whether the drafts were due as stated in the acceptance—was a question of fact for the jury.

The bill was payable sixty days after sight. The acceptance was, " Accepted, payable at Messrs. Barclay & Co., Bankers, London. Due May 21." It was protested May 21. There was no proof upon the bill itself, nor was any offered tending to show when Turner first saw the draft. The written contract of acceptance was in evidence and was a contract.

The construction of all written instruments belongs to the court alone.

2 Parsons on Contracts, * 492.

It is next urged that the court should have left to the jury the question, whether defendant in error purchased the drafts or took them for collection on behalf of the Canton bank.

If defendant in error discounted them, if immediately on acquiring them it paid their value to the Canton bank, such fact demonstrated that it was a purchaser and not an agent for collection. Heald testified that Bell delivered them to him to negotiate for his firm; that he had general instructions from Bell to send these drafts to the defendant in error for sale; that the drafts were sold; that when they were sold the proceeds were paid to Bell & Co.; that when he sent them to defendant in error, the endorsements of Bell & Co. were in blank (*Record, p. 101*); that he sent them to defendant in error for sale (*Record, p. 102*); that the use of the words, "for collection and credit," arose through carelessness. (*Record, p. 103.*)

The testimony of Gage, cashier of defendant in error, was that it had agreed to buy the drafts of plaintiffs in error, if endorsed by the Canton bank (*Record, pp. 114, 115*); that immediately upon receipt of the drafts, the value of them was paid by it to the Canton bank (*Record, pp. 115, 116*); that defendant in error gave the Canton bank full value for them, and did not receive them for collection. (*Record, p. 116.*)

Mr. Boulton testified that defendant in error bought the drafts from the plaintiffs in error, and paid for them. (*Record, p. 133.*)

The only evidence, if any, conflicting with the facts showing a *purchase*, was the language of the drafts and the accompanying letters.

The testimony admitted demonstrated, beyond all possibility of doubt, that defendant in error bought and paid for the drafts upon the days when they were received, and that plaintiffs in error got the proceeds, and that the use of the words, "collection and credit," arose from carelessness in the use of the rubber stamps and printed forms. There was no evidence to the contrary. There was none tending to show that the Chicago bank did not buy and pay for the drafts. There was none that it took them for collection. The undisputed substance of the transaction stamped it as a purchase, beyond any shadow of controversy.

The testimony referred to by counsel for plaintiffs in error casts no doubt over the transaction. The language of the bills and letters is answered by the testimony and by the *fact* that the value of the drafts was paid for them on their receipt. The testimony is undisputed, that the use of the words "collection and credit on account of," was the result of carelessness, and did not express the real transaction, and, even without that testimony, the fact of purchase was established.

Bell himself testifies that his firm received the proceeds of the draft (*Record, p. 178*), and he does not pretend that either defendant in error or the Canton bank received them, as his agent, for collection. On the theory, which there was some evidence to support, that the transaction was a purchase by defendant in error from plaintiffs in error, under such previous arrangement, it was proper to inquire when the special endorsement, over the signature of plaintiffs in error, on the drafts, was written, and by whom. If the other theory, which there was evidence to establish, be correct, that the Canton bank purchased the drafts from plaintiffs in error, and defendant in error purchased them of the Canton bank, it was still a purchase. In any aspect, the undisputed fact on the record is, that defendant in error purchased and was the *bona fide* holder of the drafts.

Bell, the managing partner of the plaintiffs in error, testified in his own behalf, that he never made any arrangement with defendant below; nor did any one, to his knowledge, or with his authority, do so, relating to the purchase of drafts by defendant in error from plaintiffs in error (*Record, p. 173*); that the Canton bank paid money on the firm's checks, drawn against these drafts, before the drafts were given to the Canton bank, and that said firm received from the Canton bank the proceeds of the drafts (*Record, p. 178*); that the interview he had with defendant in error, and to which Boulton had testified, occurred prior to the formation of the firm of Humphrey Bell & Co., and related to a different firm, that of Ingersoll & Bell.

Foster, called by plaintiffs in error, testified that his interview with defendant in error, to which Boulton had testified, occurred prior to the existence of Humphrey Bell & Co., and related to the firm of Ingersoll & Bell.

The case, then, as made by plaintiffs in error, was that no agreement ever existed between plaintiffs in error and defendant in error, whereby the latter were to purchase their drafts, and that the drafts were not purchased of them by defendant in error, and that their dealings were solely with the Canton bank.

Certainly they can not assign for error, that their own testimony was accepted as true; and, if true, it established that the drafts were purchased by the Canton bank from plaintiffs in error, and from the Canton bank by defendant in error.

It is urged that numerous items of expenditure by the Chicago bank were by it charged to the account of the Canton bank, and the Canton bank notified thereof.

These charges were for cablegrams and protest fees. (*Record, pp. 161-162.*) Also, that after the drafts were returned from London the Chicago bank advised the Canton bank, that it charged the account of the Canton bank with the amount of the drafts, and asked for reimbursement. (*Record, p. 163.*) And it is inquired why this should have been, if the drafts were *purchased* directly from Bell & Co.?

In the first place, this evidence demonstrates that defendant in error had *purchased* from some one, either the Canton bank or plaintiffs in error, and that it had not taken the drafts for collection. An agent for collection does not, when collection becomes impossible, charge his principal with the amount he has failed to collect. It is an immaterial inquiry in the case, whether the purchase was of plaintiffs in error or the Canton bank, inasmuch as in either case it was a purchase, and both plaintiffs in error and the Canton bank were liable upon the drafts. Finally, the Canton bank was an endorser upon the drafts, and defendant in error had a right to charge it with, and collect from it, the amount of the drafts, whether the defendant in error purchased from the Canton bank or from plaintiffs in error.

No fact, outside the realm of fixed science, was ever demonstrated more conclusively than this, that defendant in error was the purchaser of the drafts. No evidence in the case attacks it. Was it, then, a question for the jury?

It is stated by this court to be the established doctrine of this court, that " Although there may be some " evidence in favor of a party, yet if it is insufficient to " sustain a verdict, so that one passed thereon would be " set aside, the court is not bound to submit the case to a " jury, but may direct them what verdict to render." And that, " When the evidence, as given at the trial, with " all inferences that the jury could justifiably draw from " it, is insufficient to support a verdict for the plaintiff, so " that such a verdict, if returned, must be set aside, the " court is not bound to submit the case to the jury."

*Herbert* v. *Butler*, 97 U. S. 320.
*Randall* v. *B. & O. R. R.*, 109 U. S. 482.
*Pleasants* v. *Fant*, 22 Wall. 116.
*Imp. Co.* v. *Munson*, 14 Wall. 442.

The fact that defendant in error bought the drafts, was so completely demonstrated, and the alleged conflicting evidence was so plainly not conflicting, and was so slight, even with all the inferences that the jury could justifiably draw from it, that a verdict for the defendant below on this ground must inevitably have been set aside by the court, and the court was therefore right in instructing them what verdict to render, so far as this question was concerned.

It is stated that there are other questions of fact which ought to have been submitted to the jury, as :

1. Whether, under all the facts and circumstances, the London bank was the agent of plaintiffs in error or of defendant.

The only material inquiry was, whether, *in regard to the custody and disposition of the meats* represented by the bills of lading, the London bank was the agent of plaintiff or defendants. As we have shown, the letters of hypothecation demonstrated that it was the agent of plaintiffs in error. The only connection of defendant in error with the agency was a right to have payment out of the proceeds. There was here no question for the jury.

2. Whether the property was held and disposed of by the London bank, under the hypothecation papers, or under the instructions contained in letters, telegrams and cablegrams.

The hypothecation papers, telegrams and cablegrams were all the acts of plaintiffs in error, except the words, "under your control," which clause was a restriction merely, which Gage had a right to add. It represented the intention of plaintiffs in error, as Bell testifies, and was not acted upon. The inquiry, therefore, was immaterial. There was no question for the jury.

3. Whether it was, in fact, intended by the defendants below, by their instructions and telegrams, to change

or limit the terms or powers as to selling the bacon, and that this was so understood, accepted and acted upon by plaintiff below.

These instructions and telegrams were in writing. Their meaning was a question of law. That plaintiffs in error intended to, and did, thereby make the London bank their agent, cannot be doubted upon an inspection of the papers. As by the letters of hypothecation, the London bank was agent of plaintiffs in error, in regard to the meats, and as they did give further instructions to their agent, what they intended thereby is a matter between them and their agent, which is not involved in this proceeding. If they intended one thing by their dispatch, and their agent construed it differently from such intention, this cannot concern defendant in error. If they had certain conversations with Heald, which he never communicated, this cannot affect defendant in error. Nor is the latter accountable for any misunderstanding between plaintiffs in error and their agent. There was no question here for the jury.

4. Whether there was, in fact, negligence by plaintiff below, or its officers, agents or employés, by reason of which loss occurred to the defendants below.

Not only was there no evidence to sustain this position, but the evidence negatived the conclusion. As the London bank was the agent of plaintiffs in error in regard to the meats, aud was not the agent of defendant in error, the latter had no duty in the premises, and hence was guilty of no negligence.

5. Whether plaintiff below, in fact, assumed control of the property, and placed it beyond control of defendants.

There was no evidence to sustain such position.

6. Whether there was negligence by plaintiff below, or those acting for it, in leaving the proceeds of the property in the hands of a *factor* for several months, and that loss accrued to defendants below by such negligence.

Plaintiffs in error, by the hypothecation papers, authorized the London bank to " place the goods in the hands of (their) your broker for sale." Afterwards they directed it to " request Alfred Jacks to sell goods for benefit of drafts." It is of no consequence to this case what are the distinctions between a factor and a broker. Plaintiffs in error authorized the London bank to *place the goods in the hands* of their broker—that is, deliver him the custody of them. The London bank did not do so. They then authorized the London bank to let Jacks sell the goods. They now claim that they meant that he should sell as a broker, and not have possession. So far from interfering with such intention, defendant in error promoted it, as it had a right, without being under an obligation, to do. The instructions offered by plaintiffs in error in this connection were, therefore, properly refused, and no question for the jury arose in the premises.

## VII.

The seventh assignment of error is, that the " finding " and judgment of the court below are contrary to the law " and evidence."

Under this assignment, plaintiffs in error have made no specifications. We, therefore, do not think it necessary to enter into an examination of the evidence, or into a general argument upon the merits of the case. We have examined, under the other assignments of error, the questions of law and so much of the evidence as was referred to by counsel for plaintiffs in error, in connection with such assignments, and, therefore, add nothing under this assignment.

CHARLES A. DUPEE,

*Of Counsel for Defendant in Error.*

H. A. Gardner
of Counsel

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Clerk.

IN THE

# SUPREME COURT of the UNITED STATES,

OCTOBER TERM, A. D. 1884.

(No. 294.)

HUMPHREY BELL, ANDREW J. WHITNAH AND HIRAM A. WHITNAH,
*Plaintiffs in Error,*

vs.

THE FIRST NATIONAL BANK OF CHICAGO,
*Defendant in Error.*

Error to the Circuit Court of the United States, Northern District of Illinois.

## Brief for Defendant in Error upon Motion to Strike from the Record the "Charge to the Jury."

**CHARLES A. DUPEE,**

**Of Counsel for Defendant in Error.**

CHICAGO:
HORACE O'DONOGHUE, BRIEF AND ABSTRACT PRINTER, 95-97 WASHINGTON ST.
1885.

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The motion of plaintiffs in error is, to strike from the record the charge of the court below to the jury, which appears in full in the transcript which plaintiffs in error have themselves brought here.

We think this court will conclude that, under the circumstances of this case, the action of the court below, in inserting its charge at length, was justified. This, however, we do not propose to discuss. If that court violated the rule made to control circuit courts in preparing records for this court, the matter may be dealt with as shall seem best to this court. The record which the motion seeks to mutilate *is* the record. No change to correct an alleged variance between the transcript here and the record below is sought, but this court is asked to strike out a part of that record as actually made by the Circuit Court. We know of no law or practice under which this court has that power. The affidavit of Mr. Saunders certainly makes no foundation for such a practice. It merely shows that the charge did not become a part of the record through the acts of plaintiffs in error. But this is immaterial. If the Circuit judge refused to sign a proper bill of exceptions, the remedy of the plaintiffs in error was by *mandamus* to compel him to do so.

High on Extraordinary Remedies, §§ 199–215.
*Ex parte Crane*, 5 Peters, 189.

But the bill of exceptions presented for approval to the Circuit Court was not a correct, and therefore not a proper, bill of exceptions. The Circuit judge did not, as shown by that original draft, simply instruct the jury to find for the plaintiff, but first made a series of preliminary rulings and findings to support his final instruction, and to these preliminary rulings and findings, so far as claimed to be erroneous, it was the duty of plaintiffs in error to have excepted *seriatim*. They failing to do this, the Circuit judge might have refused altogether to allow the bill of exceptions they had prepared; and it is not matter of complaint on their part, that instead of so doing, he required that the record should show the charge actually given.

It is perhaps intimated by the brief for plaintiffs in error upon the motion, that they failed to except to portions of the charge, because a stenographer's copy of the charge was not filed until after the trial. But it is a fact that the charge was given upon the trial, before the verdict of the jury was rendered, as the record itself shows. When a copy was filed, is immaterial. Plaintiffs in error had every opportunity of exception that was ever offered in any case. If they have not availed themselves of that opportunity, such fact will not induce this court to falsify the record for their benefit.

In any event, we think this motion comes too late at this time. If allowable at all, it is in the nature of a motion for *certiorari* to supply a diminution of the record, and by analogy to Rule No. 14, in regard to such motions, should have been made at the first term of the entry of this cause.

Respectfully submitted,

CHAS. A. DUPEE,

*Of Counsel for Defendant in Error.*

H. C. A. Gardner
of Counsel